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REPORTS

John OF White

515

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ALABAMA,

During parts of June Term 1848, and January Term, 1849.

40575

VOLUME XV.

J. J. ORMOND, REPORTER.

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OFFICERS

Ohn of White

THE SUPREME COURT,

DURING THE TIME OF THESE DECISIONS.

HENRY W. COLLIER, Chief Justice.
EDWARD S. DARGAN, } Associate Justices.
WILLIAM P. CHILTON, }

M. A. BALDWIN, Attorney General.
GEORGE C. BALL, Clerk.

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CASES

ARGUED AND DETERMINED,

JUNE TERM, 1848.

FALKNER v. LEITH & JONES.

1. Land acquired by entry, and for which a receipt of full payment has been executed by the register, vests such title in the person to whom it is given, as may be sold under execution at law.
2. Neither the acts, or declarations of a debtor subsequent to the institution of a suit against him, to recover a tract of land sold under execution, can be given in evidence against the creditor.
3. A recital in an assignment of a land certificate, that it was transferred for a valuable consideration, is not evidence against one, who was a creditor of the assignor, at the time. The burthen of proving the consideration is cast upon the grantee.
4. In a suit against two, the admissions of one defendant are competent tesmony. If the co-defendant desires to avoid the effect which such admissions may have upon him, he should ask a charge of the court.

Error to the Circuit Court of Cherokee. Before the Hon. G. D. Shortridge.

TRESPASS to try title to a tract of land, by the plaintiff against the defendant in error.

From a bill of exceptions it appears, that the plaintiff was a purchaser of the land in controversy, at sheriff's sale, under

execution against James Leith, one of the defendants in error, which was conveyed to him by the sheriff.

The defendants produced the certificate of the receiver of the land office, acknowledging the receipt from the said James Leith, of the purchase money of the tract sued for, on the back of which was the following transfer: "For value received, I assign the within certificate to Moses Jones, and hereby authorize the patent to the within described land to issue in his name. Witness my hand and seal this 4th day of October, 1842. James Leith, (seal.)" This transfer was made before the register, and certified by him on the certificate of the receiver. The defendants also proved, that since the commencement of the suit, one Baker, had rented the land from one John Leith, who said at the time he was acting for Jones, the defendant. This was admitted against the objection of the plaintiff, and he excepted. It was proved there was no change in the possession of the land, from 1835 or 1836, until six months after the commencement of this suit, when Leith, one of the defendants, moved to Jackson county, where Jones, the other defendant resided. The plaintiff also proved, that a few days after the judgment on which the land was sold, was rendered, Leith told witness, that it was unjust and he never intended to pay it. That he had sold, or conveyed the land to Jones; that it could not be sold to satisfy the judgment, and that he had made an arrangement with Jones about it. Plaintiff offered to prove, by the same witness, that Leith at the same time wanted to convey his other property to witness, to prevent its being sold to satisfy the judgment. On defendant's objection this was excluded, and plaintiff excepted.

The court charged the jury, that the assignment of the receiver's certificate, was in the nature of a deed, and of itself imported a consideration, as against a subsequent purchaser, or creditor, who had assailed it for fraud. That Leith remaining in possession of the land, for a long time after the transfer to Jones, was not of itself sufficient to create a presumption of fraud, but might become evidence of fraud, when taken in connection with the other circumstances tending to show fraud.

The plaintiff moved the court to charge, that if Leith was

indebted to the plaintiff when the assignment was made, which was only seven days before the rendition of the judgment, that Leith had remained in possession of the land until six months after the commencement of this suit, and that Jones and Leith were brothers-in-law—that these circumstances raised a presumption of fraud in the assignment, until the defendant proved that a valuable and sufficient consideration was paid by Jones. This the court refused to give, and the plaintiff excepted, as well to the charges given, as to those refused, and here assigns these matters as error.

A. J. Walker, for plaintiff in error.

Leith's declarations, after the assignment of the receiver's certificate to his co-defendant, Jones, were competent evidence—1. Because the retention of the possession of the land by the vendor, strengthened by the other facts in the case, created the presumption of a combination to defraud, and rendered the declarations of the vendor evidence against the vendee. Goodgame v. Cole & Co. 12 Ala. 77; Abney v. Kingsland & Co. 10 Ala. 355; Borland v. Mayo, 8 Ala. 104.

2. Because Leith was a party to the record, (the original defendant,) and his own declarations were evidence against himself at least. Palmer v. Severance & Stewart, 9 Ala. 75.

The authorities all show, that a deed is not of itself evidence of a consideration when assailed for fraud by third persons, and not by the parties to it. McCaskle v. Amarine, 12 Ala. 17; 3 Philips on Ev. 1448, note 969; McCain v. Wood, 4 Ala. 258; Branch Bank at Decatur v. Kinsey, 5 Ala. 9.

The long continued retention of possession of the land created a presumption of fraud, or was in other words a badge of fraud. Clay's Dig. 254, § 2; P. & M. Bank of Mobile v. Borland, 5 Ala. 546; Blocker, adm'r, v. Burress, 2 Ala. 354.

The recital of the assignment on the receiver's certificate, that it was made for value received, could not be evidence against any person except the parties to the same. Branch Bank at Decatur v. Kinsey, *supra;* McCain v. Wood, *supra.* The admissibility of a recital in a deed depends on the same principle, as the admissibility of the declararions of the grant-

or. Leith's declaration that he had received "value" for making the assignment could not be evidence against plaintiff in this cause, and certainly not evidence of a consideration. 3 Phil. on Ev. 1236; Berry, use, &c. v. Hardman, 12 Ala. 604.

It is certain that the indebtedness of Leith to Falkner, the short time that elapsed between the date of the assignment, and the judgment, the relationship of the parties, and the long continued possession of the land by Leith, and the small amount of Leith's property left, after the assignment to Jones of his land, created a suspicion of the fairness of the transaction, and a presumption of fraud, and devolves upon the vendee, or assignee, to show that the arrangement was made for a valuable consideration, and with honest motives. McCaskle v. Amarine, 12 Ala. 18; Goodgame v. Cole & Co. Ib. 77, and cases above cited.

L. E. Parsons, contra.

1. This case has been here before, and the court say, "we think the law is, that the assignment of the land office certificate, by a valid instrument, will prevent the title of the land from passing to a subsequent purchaser at sheriff's sale." Falkner v. Jones and Leith, 12 Ala. 172. The certificate does not vest a title in the holder, which is subject to sale under judgment at law. Our statute makes it a "full, complete and legal title, so far as to enable the holder of such certificate to maintain any action thereon." Dig. 341, § 157. This leaves the liability of the land to sale at law as it was before the passage of the act. The certificate is only evidence to show who has the right to a legal title. But for the statute, the holder could not sustain ejectment or any other action.

2. The admission of what John Leith said, when he was renting the land, is a part of the transaction, and proper to go to the jury.

3. It has been decided, over and over, that such a seal does import a consideration. The plaintiff says he assails this deed for fraud; but he proves none. It is contended therefore, that *prima facie* this deed is good until they have shown something more than the facts disclosed by this record.—

Whitney v. Stearns, 4 Shipley, 394; Sloan v. Gibson, 4 Missouri, 33; Chitty on Con. 27.

CHILTON, J.—1. It cannot be considered as an open question in this court, whether land acquired by entry, and for which a receipt of full payment, certifying the entry, has been executed by the register, vests such title in the person to whom it is given, as is subject to be sold under execution at law. This precise point was decided in Goodlett v. Smithson, 5 Porter's Rep. 254, which was recognized as settling the rule correctly in Rosser v. Bradford, 9 Porter, 345, and also in the decision upon this case when heard previously, 12 Ala. Rep. 170. The rule has become too firmly settled by judicial decision now to be departed from, however much I might be disposed, were the question *res integra*, to a different conclusion.

2. It is very clear, that neither the acts nor the accompanying declarations of Leith, the defendant, which occurred subsequent to the institution of this suit against him, as the same were allowed to be proved in this cause, are admissible, for if such proof were allowed, there would be no end to the expedients to which men might resort, to fabricate testimony, so as to meet the various exigencies of their defence.

We might here close, but other points are presented which may again arise upon another trial, and therefore require a decision.

The same reasoning is equally applicable to the question of consideration, as evidenced by the recital in the transfer of the receipt by Leith to Jones. This transfer was made after the debt was due to the plaintiff under which the land was sold, and only seven days before it was reduced to judgment. And Leith remained in the possession of the land which he had thus transferred to Jones, his kinsman. Now we think it very clear, that under the circumstances of this case, it was incumbent on the defendants, in order to defeat the right of the creditor, to show the consideration of the sale. If the bare recital proves the consideration, then a debtor seeking to screen his property from the payment of his debts, may by a dash of the pen insert in his fraudulent transfer, "*for value received*," and set his creditors at defi-

ance. Such transactions are most usually unattested by witnesses, and in most cases, the creditor would find it impossible to prove a negative—that the payment was *not* made, whereas the *honest* purchaser would rarely fail for want of proof. Upon principle, therefore, it would seem the proof of consideration should be made by the party holding the affirmative. The point however is well settled upon authority. In McCain v. Wood, 4 Ala. Rep. 258, it was held, that when the contest is between the creditor and the grantee, in a trust deed to secure another creditor, the consideration of the deed must be shown, and is not proved by the recitals in the deed, or by the admissions of the grantor at the time of its execution. So in the Branch Bank at Decatur v. Kinsey, 5 Ala. 9, it was held, that as a voluntary conveyance was void as against creditors of the grantor, it was necessary, that the person claiming under such conveyance, should prove the consideration in a controversy between him and the creditor. Also, that in such case, the recital in the conveyance is no evidence of consideration, as it is no more than the admission of the grantor, but the fact must be proved by extrinsic evidence. See also, McCaskle v. Amarine, 12 Ala. 24.

As to the admissions of Leith, which were rejected by the circuit court, and which were offered to be proved *against* him, they should have been allowed. They are evidence against him, and if the defendant, Jones, desired to avoid any effect which he supposed such admissions of his co-defendant might have upon him, a charge should have been asked of the court. Palmer v. Severance, et al. 9 Ala. Rep. 751.

These views will be a sufficient guide for the final disposal of the case in the court below.

Let the judgment be reversed and the cause remanded.

ASHLEY'S DIS. v. ASHLEY'S ADM'R.

1. An order, or decree, of the orphans' court, accepting the resignation of an administrator, and directing him "to pay over to his successor, when known, the sum of $2696 84, being the amount due from him to said estate," is not such a final decree, as will protect the adminisrator against a citation for a a final settlement of the estate, by the distributees of the estate, although he had paid over to his successor, the sum ascertained by the previous decree, to be due from him.

Error to the Orphans' Court of Montgomery. Before the Hon. Adam C. Felder.

The facts appear in the opinion of the court.

Mays, for the plaintiff in error.

Belser & Harris, contra.

1. It is admitted, that by our decisions, the annual returns of an administrator may be corrected on a final settlement of the estate, and such a decree be rendered, as will be proper upon a view of all the facts. Willis's adm'r v. Willis's heirs, 9 Ala. 335; Brazeal's adm'r v. Brazeal's dis. ib. 496; Cunningham v. Pool, et al. ib. 620; Smith's heirs v. Smith's adm'r, 13 ib. 329. But where items have been passed on, by the orphans' court, seeh an adjudication of them, is at least, *prima facie* proof of their correctness, in favor of the administrator. Mills's adm'r v. Mills's heirs, &c., at this term; Allen v. Hubbard, 8 New Hamp. 487; Loring, adm'r v. Sternman, et al. 1 Metcalf 207, 208; McCall v. Peachy, adm'r 3 Munf. 288; and such items ought not to be received, unless by a court of equity, or on a petition filed for the purpose, setting forth fraud or mistake: and the application should be made within a reasonable time. Burton and wife v. Dick, et al. 3 Yerger, 112; Bunting's appeal, 4 Ser. & Watts, 460; Stetson v. Bass, 9 Pick 26; Taylor v. Benham, 5 Howard U. S. 223; Crombe v. Engle, 4 Harr. 83; Dement et al. v. adm'r of Burgess, 13 Ala. 140.

2. The citation in this instance, was properly discharged. The administrator, in 1839, made a final settlement with the

court, resigned his trust, and was ordered to pay over to his successor, which order has been fully complied with. He is not in default, in any manner. Leland v. Kingsbury, 24 Pick. 317; Skinner v. Frierson, 8 Ala. 915; Gayle v. Elliot, 10 Ala. 265; Watson and wife v. May, 8 ib. 177.

DARGAN, J.—On the 4th of January, 1837, William Ashley was appointed administrator of the estate of James Ashley, deceased, by the orphans' court of Montgomery. He returned an inventory of the estate, and account of sales: he also petitioned the court, that commissioners be appointed to divide the estate, amongst the children, and widow of the decedent, and commissioner's were appointed by the order of the court. On the first of November, he filed his accounts in the orphans' court, which showed, that he had in his hands, twenty six hundred and ninety six dollars eighty four cents. He then tendered his resignation as administrator, which was accepted, and an order was then made, that he be no longer administrator of said estate, and that he pay over to his successor, when known, the sum of twenty six hundred and ninety six dollars eighty four cents, being the amount due from him to said estate. On the 24th of July, 1848, a citation was issued to him, at the instance of the distributees, requiring him to appear, and make a final settlement of his administration.

The administrator appeared, and objected to entering into an examination of his accounts, or making any further settlement, alledging, that a final settlement of his administration had been previously made, and he discharged from the administration by the previous order and decree of the orphans' court; and relied upon the orders referred to, and introduced proof to show, that he had delivered over to the distributees, their respective shares, and had paid to his successor in office, Felix Ashley, who was appointed administrator *de bonis non*, the sum ascertained to be due, from him to the estate, in his settlement made Nov. 1839. The orphans' court upon the production of these orders, and this proof, dismissed the application for final settlement, on the

ground that the defendant had made a final settlement of his administration, and refused to proceed further with the examination of the cause.

A final settlement of a decedent's estate, whether it be had at the instance of the administrator, or of the distributees, is a judgment, or decree of the orphans' court, definitely ascertaining, and settling, the rights of all parties interrested in it. The material requisites therefore, of a final settlement are, first, that there be parties to it, whose rights are bound thereby; secondly, that those rights should be judicially ascertained, and established by the judgment of the court. Tried by these requisite, the orders of the orphans' court relied on, as showing a final settlement, or decree, possess not one quality of a final settlement. Who were the parties to it? Are their rights ascertained by it? The record of the orphans' court does not inform us. It is true, that the administrator was ordered to pay over to his successor in office, the sum ascertained to be in his hands, when such successor should be known; but this is no judgment, or decree, for it is not rendered in favor of any one; such a judgment, if it was even intended as such, by the orphans' court, would be void. 11 Ala. Rep. 740; 5 ib. 280.

The orphans' court therefore, erred, in dismissing the application, and in refusing to require the defendant to make a final settlement of his administration, and for this error the cause must be reversed and remanded. As the orphans court dismissed the application for final settlnment, for the reason that one had been prematurely made, we can only review this act. To what extent the defendant may be liable, or what will be proper evidence to charge, or discharge him, we can intimate no opinion; we only say, that the records of the orphans' court do not show a final settlement, and the distributees have no right to call the defendant before the orphans' court to make one.

The decree of the orphans' court is reversed, and the cause remanded.

PATTON v. HAYTER, JOHNSON & CO.

1. If a senior judgment creditor instructs the sheriff to hold up the execution issued thereon, it is fraudulent in law, as against subsequent judgment creditors, and will postpone the lien of his judgment on the real estate of the debtor in favor of junior judgments, upon which executions have issued, and been served, before a second execution is sued out on the elder judgment.
2. A bill of exceptions is to be taken most strongly against the party excepting, and all reasonable presumptions will be indulged by an appellate court in favor of the judgment of a subordinate tribunal.
3. If an alternative state of facts is presented for the determination of the primary court, one of which will sustain, and the other reverse its judgment, it devolves upon the party against whom its decision has been made to negative, in his bill of exceptions, either by positive statement, or by a recital of *all* the evidence, the alternative which supports the judgment.

Error to the Circuit Court of Madison. Before the Hon. G. D. Shortridge.

In this case, a motion was made to the court for an order to the sheriff, as to the application of a sum of money in his hands, raised from a sale of the real estate of one Fredrick Elgin, against whom the plaintiff and defendants had severally obtained judgments and executions. It appears by the bill of exceptions found in the record, that the plaintiff in error, on the 26th April, 1841, obtained a judgment by confession against said Elgin, with a stay of execution for six months; that execution issued on said judgment, and was delivered to the sheriff of Madison county, on the 17th day of November, 1841; that said execution has never been returned to the court whence it issued, but has been held up by said plaintiff in error, or is still in the sheriff's hands; that at the time said execution was delivered to the sheriff, said Elgin was perfectly solvent, having in his possession a considerable amount of real and personal property; that on the

—— day of June, 1844, the defendants in error obtained a judgment against said Elgin, in the county court of Madison, for $66 36, besides costs, and on the —— day of June, 1845, they recovered judgment against him in the same court for $185 46, besides costs; that executions were regularly issued on each of the judgments, in favor of the defendants in error, and returned "no property;" that on the 21st September, 1847, executions were again issued on each of defendants' judgments, and levied on certain real estate, as the property of said Elgin; that on the 29th November, 1847, afrer said property had been advertised for sale by virtue of said levy, the plaintiff in error caused an execution to be issued on his said judgment, and on the sale of the property claimed the proceeds thereof. The court, on this state of facts, direct the sheriff to apply the money, first, to the payment of the executions in favor of defendants, and if any remained, to apply it to the execution in favor of the plaintiff in error. To this direction of the court the plaintiff in error excepted, and now assigns it as error.

J. Robinson, for plaintiff in error.

The property of defendant sold by the sheriff was land. Patton's judgment was the oldest. His execution was issued and levied upon the property before it was sold under the junior judgment. The sheriff should have been directed to pay over the proceeds to Patton. Turner v. Lawrence, 11 Ala. 430.

There is nothing in the proof tending to show that Patton's judgment was dormant, or his delay fraudulent.

Ormond, contra.

The judgment was obtained by Patton by confession, from Elgin, in 1841, and execution issued thereon during the same year, and the bill of exceptions states, that the execution has never been returned, or has been held up by order of the plaintiff. Conceding that the true interpretation of the bill of exception is, that Patton caused another execution to be issued in 1847, and placed in the sheriff's hands, this was not done until the levy of the defendant on Elgin's

land, and its advertisement for sale. Under these circumstances, I contend, first, that the execution of Patton had become dormant by his *laches*, whilst the defendant is a vigilant creditor, who has re-issued his execution without the lapse of a term, and is therefore entitled to a preference within the very terms of the decision relied upon on the other side from 11 Ala. 430.

Second, that as Patton's judgment was obtained by *confession*, it is as against a judgment creditor, obtained in the ordinary mode, to be considered fraudulent until the consideration is proved. Roberts on F. Con. 489, and cases cited.

COLLIER, C. J.—By an act passed in 1835, it is enacted, that when any execution shall have been issued on any judgment, &c., within a year and a day after the rendition of such judgment, &c., which shall not have been returned *satisfied in full*, it shall be lawful at any time thereafter to issue execution thereon, without suing out a *scire facias*, or any process to revive the same. *Further*, when an execution shall have been sued out on any judgment, &c., within a year and a day from the rendition thereof, and not returned *satisfied in full*, such judgment, &c., shall not afterwards be presumed to be paid or satisfied, unless payment or satisfaction be entered on the record of the court in which the same shall have been rendered, &c., or unless no execution shall have issued for the space of ten years. Clay's Dig. 206, § 28.

The terms of this statute are too explicit to leave room for controversy. So far from requiring the execution issued within a year and a day to be returned "no property found," or other equivalent return to be made, it is expressly declared, that the fact of satisfaction must be affirmed by the return; and if the execution thus sued out is not returned *satisfied in full*, it is competent to issue another, any time within ten years. It may then be conceded, that as the time prescribed by the statute had not elapsed between the issuing of the first and second execution of the plaintiff in error, the latter was regularly sued out.

Upon this hypothesis, the question arises, whether the second execution derived any additional potency from the first, so as to continue the lien of the judgment from the period of

its rendition. It has been repeatedly held, by this and other courts, that if an execution is delayed by the act of the plaintiff, it never acquires a lien upon the goods of the debtor, as against one of a junior date; or if it does, the lien is gone as soon as the interference of the plaintiff commences, and will only become operative from the time the sheriff is required to execute its mandate. See Wood v. Gary et al. 5 Ala. R. 43. In the opinion delivered by myself in that case, it is said, "the process is mandatory, and requires the officer to make a sum of money of the goods and chattels, &c. of the defendant, and have the money at a term therein designated, to render to the plaintiff, together with the writ, &c.; if the course of law is arrested by the direction or approval of the plaintiff, during all that time nothing is done towards enforcing the payment of the judgment, and the effect in point of fact, is the same as if no execution had issued. The legal presumption is, that the plaintiff intended to favor the defendant by suing out his execution; while he would obtain a lien prior to others, he would, under its protection, secure to the defendant the enjoyment of his property against subsequent executions. No matter how humane and benevolent the motives which might prompt to such a course, they would not relieve the elder execution from being fraudulent in law." An execution which is fraudulent as respects those subsequently issuing, is void, and inoperative to affect rights which otherwise arise under them. Being fraudulent as against a junior execution, it cannot have the effect to continue the lien of the judgment as against subsequent judgment creditors, whose executions have been levied before a second *fieri facias* was sued out. Its efficiency being paralized by the act of the plaintiff, it cannot prejudice the diligent creditor, who has caused the property of the debtor to be first seized; but as it respects him, it is as if no execution had ever issued.

It has been supposed from what was said *arguendo* in the opinion of a majority of the court, in Wood v. Gary et al. that the interference of the plaintiff should be *fraudulent in fact*, in order to impair the lien of the suspended execution; and this conclusion, it is contended, is enforced by the Br. Bank at Huntsville v. Robinson, 5 Ala. Rep. 623, and Tur-

ner v. Lawrence, 11 Ala. Rep. 426. Attention to the facts of these cases will show, that although some stress may seem to be laid upon the absence of fraud, as a fact, what was said upon the point was not material, and did not enter into the decision of the cases, and cannot therefore be regarded as authoritative, even if it be in conflict with the view we have taken of the law.

If then, the lien of first the execution was destroyed by the direction of the plaintiff to hold it up, no consequences prejudicial to the defendants in error would result from its having issued. But it would effect no purpose as against them—being as we have seen fraudulent in law, and of consequence void. In determining the superiority of the respective liens, the plaintiff in error stands precisely in the predicament as if no execution had issued in his favor until the levy of the defendant's *fi. fa's.* This being the case as against the defendants, his judgment would be dormant and inoperative by the failure to sue out a valid execution within the year and a day, and though his judgment was prior in time, its collection would be postponed. See Conard v. The Atlantic Insurance Co. 1 Pet. Rep. 386; United States v. Morrison, 4 Pet. Rep. 124; Porter v. Cocke, Peck's Rep. 30; Moliere v. Noe, 4 Dall. Rep. 450; Kemper v. Hock, 1 Watts' Rep. 9; U. S. Bank v. Winston's Ex'r, 2 Brockb. Rep. 252; Jackson v. Knight, 4 Watts & Sergt. Rep. 412; Burney v. Boyett, 1 How. Rep. (Miss.) 39; Grand Gulph v. Henderson, 5 Ib. 292; Michie v. Planters' Bank, 4 Ib. 178; Lucas v. Stewart, 3 Smedes & Marsh. Rep. 231; Pickett v. Doe, 5 Ib. 470; Mansony & Hurtell v. The U. S. Bank and Assignees, 4 Ala. Rep. 735.

It is stated in the bill of exceptions, that the first execution sued out by the plaintiff in error, has never been returned, "but was held up by the plaintiff, or is still in sheriff's hands." If we are to understand by this, that the proof showed either that the plaintiff was active in preventing the mandate of his *fieri facias* from being executed, or that the sheriff *mero motu* failed to make the money thereon, our conclusion must be the same as if the positive interference of the plaintiff had been proved. It devolved upon the circuit court to determine which of these alternative facts was es-

tablished, and we must intend, that that court supposed the first at least was proved, as its existence was necessary to the judgment we are called on to revise. If this hypothesis be false, it should have been negatived by the bill of exceptions, either by a positive statement, or a recital of all the evidence submitted. It is well settled, that a bill of exceptions shall be taken most strongly against the party excepting, and that all reasonable presumptions shall be indulged by an appellate court in favor of the judgment of a subordinate jurisdiction. Under the influence of these principles we may rest our conclusion upon this point. It remains but to add, that the judgment of the circuit court is affirmed.

DARGAN, J.—Although I agree with the court, that the judgment in this case should be affirmed under the facts, yet I cannot assent to the proposition, that the lien of an older judgment creditor, on the real estate of the defendant, will be postponed in favor of a junior, on the ground alone, that the sheriff has been instructed by the plaintiff in the elder judgment, not to sell under the execution issued thereon, or because the plaintiff has held it up, and declined to have the land sold. If the plaintiff in the older judgment has a valid execution in the hands of the sheriff, at the time of the sale under the junior judgment, he is certainly entitled to have his older lien satisfied, and has priority over the junior judgment creditor. And although the plaintiff may have, from time to time, previously ordered a stay of the sale, or a return of the execution, this, in my opinion, will not postpone his lien on the real estate of the defendant, in favor of a junior judgment creditor.

MOORE v. BRIGGS.

1. M, purchased a carriage of B, and for the payment of 150 dollars, part of the price, drew an order in favor of B, as follows: "Mr McGuire will please pay, when collected, of fees now due, as orphans court fees, one hundred and fifty dollars, and I am to be responsable for interest on this order, until paid," which was accepted by McGuire. B, at the same time, in writing, acknowledged the receipt of the order, and other claims, in payment of the carriage. It was proved that more than $150 was due M, in fees, when the order was drawn, but that McGuire did not collect them, but turned the fees, and fee docket, over to one Blount, his successor in the office of county court clerk, of which M was judge. Held, that in the absence of fraud, or mistake in giving the order, and executing the receipt, and there being no proof that the fees were not due, and could not be realized, or that M had interfered to prevent the collection of the fees, B could not maintain an action against M, upon the original consideration.

Error to the Circuit Court of Tuscaloosa. Before the Hon. T. A. Walker.

The facts will appear in the opinion.

S. D. J. Moore, for plaintiff in error. The only question is one of payment. Did Briggs receive in payment of the carriage, the order set out in the bill of exceptions? Briggs himself so declares in his receipt to plaintiff in error, and the proof shows such to be the case, independent in the order. If received in payment, there is an end of the question; the judgment must be reversed.

N. L. Whitfield, contra.

The order for the fees was not made payable to Briggs, and Moore could at any time have arrested the collection, or prevented the payment to Briggs; and as McGuire was not responsible to Briggs, for a failure to collect, it follows that upon the failure of McGuire to collect the fees, and the refu-

sal of Moore on demand to pay, an action will lie on the consideration of the original contract.

The plain meaning of the whole is, that the contract was contingent, and was to be a payment only in the event McGuire collected the fees. It is wholly unlike the case of Harrison v. Hicks, 1 Porter, 423.

He further insisted, that the receipt executed by Briggs was not conclusive, but was open to explanation; and cited Gayle v. Randle, 1 Stew. 529; Sanders v. Hendrix, 5 Ala. 224; Hogan & Co. v. Reynolds, 8 Id. 59.

CHILTON, J.—This was an action of assumpsit by the defendant in error against the plaintiff. The declaration contained only the common counts. Pleas, non-assumpsit and payment. Verdict and judgment for the plaintiff below. It appears from a bill of exceptions sealed upon the trial, that the plaintiff below proved the defendant had purchased of him a carriage; that one hundred and fifty dollars of the price to be paid for it remained unpaid, (to recover which this suit was brought.) That for this sum the plaintiff received of Moore an order on one Moses McGuire, as follows: "Mr. McGuire will please pay, when collected, of fees now due as orphans' court fees, one hundred and fifty dollars, and I am responsible for interest on this order till paid. July 10, 1846. (Signed,) S. D. J. Moore." This order was accepted by McGuire, and was read in evidence to the jury. The plaintiff also proved, that the fees upon which said order was drawn, accrued while said McGuire was clerk of the county court, and before said order was given. That after it had been accepted by him, McGuire turned over his fee docket to his successor, Blount, and told the plaintiff he would not collect said fees, and refused to pay said order. Of this refusal the plaintiff notified Moore, and demanded of him payment, before bringing this action.

The defendant below proved that McGuire, at the time of accepting the order, promised to proceed and collect the fees; that fees to the amount of three hundred dollars were then, and are still due from solvent men. Also, to prove payment,

the defendant read a receipt in the following words: "Received of S. D. J. Moore, in payment of a carriage, an order on M. McGuire for one hundred and fifty dollars, and a note on Faver & Forrest for one hundred and forty dollars, due the 1st of January, 1844, and a note of said Moore, due 2d Monday in December, 1846, for thirty-two dollars, and in addition said Moore is to deliver his old carriage and harness. This 10th July, 1846. (Signed,) Amos Briggs." The court charged the jury, "If they believed from the evidence, that defendant had purchased a carriage from plaintiff, and in part payment had given the order above copied, drawn on a particular fund when collected, and not for the payment of money directly, and that the order was accepted by McGuire, who had been clerk of the county court, and that McGuire had failed to collect the fees mentioned in the order, and had turned the fees and fee docket over to Blount, the then clerk, and also, had notified the plaintiff he would have nothing more to do with it, and after this, the plaintiff had notified the defendant of McGuire's refusal to pay, and demanded of him the sum for which said order was given, and defendant refused to pay it—the order being such an instrument as could not be sued on—the plaintiff had a right to recover on the original consideration, whatever sum he had proved to be due him for the carriage sold to defendant. That the order can only be allowed to go before the jury for the purpose of showing, and explaining the transaction, and to show that it was an instrument that could not be sued on."

For the foregoing charge the defendant below excepted, and assigns the same for error in this court.

We do not see upon what principle the charge of the circuit court can be sustained. The receipt of the defendant distinctly states, that the order on McGuire, with the other notes, and the old carriage and harness, were received in *payment* of the demand now sued for.

No fraud or mistake in giving the order, or in the execution of the receipt is alledged, or pretended to be proved. So far as the history of the transaction is set forth in the record, it appears the plaintiff below obtained all he contracted for; he agreed to receive in *payment* an order on McGuire for fees which were due in the orphans' court. This order

was duly accepted, and the fees were then, and still are due, and subject to the order when collected.

The case at bar bears a strong analogy to the case of Harrison v. Hicks, 1 Porter's Rep. 423. There an order had been given, and accepted as payment by the creditor, drawn on the Cherokee agency, for money due from the government of the United States to the drawer. The holder had twice applied for the money, but failed to obtain it, as the government had not then placed the agency in funds. Held, that if the order was accepted as payment and discharge of the debt, by the contract between the parties, in the absence of fraud, or some failure, such as the record did not disclose, the contract should prevail. See also, Lowry v. Murrell, 2 Por. Rep. 280; Minor's Rep. 299; 1 Stew. Rep. 220; 2 Ib. 498; 1 Stew. & Por. Rep. 446; 2 Por. Rep. 401; 9 Ib. 146; 7 Ala. Rep. 955; 10 Ala. Rep. 755. In Trotter v. Crockett, 2 Por. 411, the court (Thornton, J.) says, "if the transfer were intended as an absolute payment, then there can be no resort to the original note, nor to the original consideration of that note." By the charge of the court in this case, the contract of the parties is abandoned. They have said the order shall be a payment, the effect of the charge is, that it shall not so operate.

If Moore, by any conduct of his, had prevented the plaintiff below from realizing the fund upon which the order is drawn, (as the counsel for the defendant in error contends he might have done,) then there would be force in the argument, that he should be liable on the original consideration, as he should not plead a contract which he has violated, in bar of a recovery. But this is not pretendod. On the contrary, the fees, which were collected, are to satisfy the order—are due from solvent men, and can be realized and rendered available to the defendant in error. That he may have difficulty in collecting such fees—that delay may intervene, and that the clerk may omit to issue executions for their collection, or may refuse to pay over the amount when collected, as by his acceptance of the order he is bound to do, only proves that the plaintiff below may have made a bad trade, but certainly, in the total absence of all fraud, imposition, or

mistake, do not authorize him to disregard the contract, and sue upon the consideration.

We need say nothing as to the right of the party to explain the receipt, as no explanation was offered to be proved, tending to show that it did not truly set forth the contract of the parties.

Let the judgment be reversed, and the cause remanded.

SMITH v. RUDDLE ET AL.

1. A deed made in Georgia, by which in contemplation of marriage, slaves are conveyed to trustees, in trust for the separate use of the wife, is not such an instrument, as is by law required to be recorded, on the removal of the property to this State.
2. Slaves being conveyed to trustees, for the separate use of the wife, with remainder to her children, they permitted the husband to have the possesion of the slaves, which he retained for more than three years, and then sold them. Held, that the statute of frauds, had no applcation, and that the fact, that the husband had been in possession three years before his sale, did not affect the title of those in remainder.

Error to the Circuit Court of Montgomery. Before the Hon. J. D. Phelan.

This was an action of trover, to recover the value of a negro girl, brought by the defendants in error against the plaintiff. On the trial a bill of exceptions was taken to the ruling of the court, which shows, that the plaintiff in the court below, to show the title to the slave in controversy, introduced a deed in evidence, bearing date October, 1836, made and executed in Richmond county, State of Georgia, by Elizabeth H. Greenwood, and George Ruddle, which recites, that a ma.riage was about to be solemnized, between the said Elizabeth H. Greenwood, and George Ruddle, and

that the said Elizabeth was entitled to a legacy under her father's will; that by the 5th clause of the will, it was required, that a marriage settlement should be made, conveying the property to which the said Elizabeth H. should be entitled, to trustees, for the use of said Elizabeth and her children, and in consideration thereof, and to carry into effect the will of the testator, the said Elizabeth H., with the consent of the said George Ruddle, which is evidenced by his signing said deed as a party, thereby conveyed, bargained, and sold unto Robert I. Greenwood, and George Schley, all her interest in the said estate, and after the division of the estate, the said Robett I. Greenwood, and George Schley, were to take the legal title, and hold the same in trust, and to receive the rents, issues, and profits of said property, during the joint lives of the said Elizabeth H. and Geo. Ruddle, and to pay the same to the said Elizabeth H., notwithstanding her coverture, for her sole and separate use, during the joint lives of the said George, and his intended wife Elizabeth H, but so that the said Elizabeth shall not have power to mortgage, or sell the same, or otherwise dispose of the property by way of anticipation; and at the death of the said Elizabeth H., the property, both real and personal, was to go to, and be equally divided between such children, as she may have, living at her death. This deed was acknowledged and recorded in the county of Richmond, in the State of Georgia. The negro sued for, is a part of the estate allotted to the said Elizabeth, and was conveyed by said deed. It was also shown, that George Ruddle, the husband, after the marriage, received the slave from the trustees, in the year 1837; and in the year 1839 removed to Montgomery county, Ala. and continued in possession, controlling said slave as his own, until March, 1843, when he sold her to the plaintiff in error, who had no notice of said deed, nor was there any instrument in writing between George Ruddle and the trustees, showing the terms upon which he received said slave from the trustees. The plaintiff's title accrued by the death of their mother, Mrs. Elizabeth H. Ruddle, who died in September 1843.

The court charged the jury, that the statute of frauds, relating to three years possession did not apply to this case—a

verdict and judgment was rendered in favor of plaintiffs below, and this charge of the court is here assigned as error.

Elmore & Yancey, for plaintiff in error.

1. The deed does not provide for the possession of the husband or wife, but excludes it. The trustees are to hold the property and pay the profits to the wife. They can also sell at their discretion.

2. Ruddle's possession is not under the deed, but is inconsistent with it, and he holds under no instrument showing the nature of his possession, but controls the property and exercises dominion over it in this state more than three years, and sells a negro to Smith, who has no notice of the deed—and no other notice of the condition of the property than what the law annexes to the possession, with claim of property. A case precisely within the terms and the mischief the statute. Clay's Dig. 255, § 2, last clause of section.

3. Nor can the husband's possession be referred to the wife's interest, for she had none in the *corpus*, but in the profits. Her possession would be illegal, because contrary to the deed, and his possession cannot be referred to an invalid one of the wife, so as to defeat the statute.

4. The possession was in the husband, and as the wife was not entitled to it, the law will now presume his possession to be her's, as it would, if she was entitled to the possession, or if she had an interest in the *corpus*.

5. If the negro belonged absolutely to the trustees, it would not admit of a question, and it is the same thing when the title and possession belong to them.

If contrary to the trust, they permit Ruddle to get hold of the property, and so to act as to perpetrate a fraud on an innocent purchaser—they must suffer and be held responsible to the children.

The deed is not impeached, but the possession of Ruddle, under the statute for three years, by his sale vested the property in Smith, and on his possession we rely—not on any thing in the deed as contrary to law, or as not probated and recorded.

J. W. Pryor, contra.

The plaintiffs are purchasers for valuable consideration.

The children of the parties are within the consideration of the marriage. Fraudulent Conveyances, 110, 123.

If any conveyance be of goods or chattels, and be not on consideration deemed valuable in law, it shall be taken to be fraudulent within this act, unless the same be by will, duly proved and recorded, or by deed in writing, acknowledged or proved. Clay's Dig. 255, § 2. Now the case does not come within this part of the statute, for the "conveyance" was founded on a "valuable consideration."

But this court has decided that a marriage contract does not come within the purview of our registry statutes. Swift v. Fitzhugh, 9 Porter, 39.

The contract was valid—was founded on a valid consideration—did not require to be registered. Now the mother of the plaintiffs was entitled to the possession of the negroes, and the possession of her husband will be referred to her title under the marriage contract. The possession is with the party who has the use of the property. 1 Hill's S. C. 16, 21. But section 3, 225, is conclusive in this matter. Doubtless the word "good," in this section, should be construed to mean "valuable."

The deed is silent about the possession. It vests the legal title in trustees, and rents, issues, &c. in wife for life, and then to the children. The children are purchasers for valuable consideration—are infants—and took a vested estate. Their title therefore could not be defeated, unless the trustees had sold the property, &c.

DARGAN, J.—It is not denied, but that the children, after the death of the mother, became entitled to the property by the terms of the deed. But it is contended, that as George Ruddle had the possession of the slave, three years before he sold her to the plaintiff in error, and the terms on which he received said slave from the trustees not being reduced to writing and recorded, and the deed of 1836 not being recorded in Alabama, the title of the plaintiff in error, who was a *bona fide* purchaser, is perfect under the statute of frauds of this State.

That portion of the act relied on, is in the following language: "And in like manner, when any loan of goods and

chattels shall be pretended to have been made to any person, with whom, or those claiming under him, possession shall have remained by the space of three years, without demand made, and pursued by due course of law on the part of the pretended lender, or where any limitation, or reservation shall be pretended to have been made, of a use, or property, by way of condition, reversion, remainder, or otherwise, in goods, and chattels, the possession whereof shall have remained in another as aforesaid, the same shall be taken, as to the creditors and purchasers of the person aforesaid so remaining in possession, to be fraudulent within this act, and that the absolute property is with the possession, unless such loan, reservation, or limitation of use, or property, were declared by will, or deed in writing, proved, and recorded as aforesaid."

That the omission to have the deed of 1836 recorded, does not affect the title of the defendants in error, is fully shown by the case of Swift v. Fitzhugh, 9 Porter, 39, for the instrument is not within either the spirit, or intention of the terms, "deed of trust, mortgage, or other legal incumbrance," as used in the act of 1824. The instruments designed by this act to be recorded, are such as create an incumbrance, or charge upon the property, for the payment or security of a debt, or demand, which do not absolutely convey away the title to the property, but only incumbers it with the payment of the debt; and it is manifest that this deed is not of that description. The only question then, is, did the sale of George Ruddle, connected with his previous possession, for more than three years, give the plaintiff in error title, as against the defendant in error? We think the object and design of the clause of the act of 1803, relied on by the plaintiff in error, was to subject the title of the pretended lender to the payment of the debts of him, to whom the loan was made, and with whom possession shall have remained, for the space of three years; or if the person so retaining the possession should sell to a *bona fide* purchaser, then to defeat the title of the lender altogether. But we are clearly of opinion, that it was not the design, or intention of the act, to defeat a title outstanding in another, over which the pretended lender had no authority, or control. Suppose, for

the sake of illustration, that the lender had a life estate in the chattel, and he loaned it to another for an indefinite period of time, and possession remained with him for three years, the terms of the loan not being reduced to writing, and recorded. In such a case, by the words of the statute, the absolute property shall be considered, with the possession, in favor of creditors, and purchasers. But it is manifest that the term *absolute property*, means only such property as the lender had in the chattel. For if instead of *lending*, the tenant for life had made an absolute sale to the party, purporting to convey the absolute right to the chattel, and possession had remained three years under this sale, and then the purchaser had sold *bona fide* to another, it could not be maintained, that this statute was intended to defeat, or would defeat the title of the remainder man, who became entitled to possession, after the death of him who had a life estate in the chattel.

This view, we think, fully shows, that the whole scope and design of the clause of the act relied on, was to subject the title of the lender, to the claims of the creditors and purchasers of him to whom the loan was made, or to the creditors and purchasers of those claiming under him.

Tested by this rule, the title of the defendants in error has not been defeated by the sale of George Ruddle. The trustees, Greenwood and Schley, had only the legal title vested in them, during the life of Mrs. Ruddle. The plaintiff below, on her death, became entitled to the property, and *this title* could not be defeated by any act of the trustees, contrary to the terms of the deed; and whatever effect the statute may have on the title of the trustees, (if it can affect a mere naked legal title,) it has no effect whatever on the title of the defendants in error, under the circumstances disclosed in the record. Let the judgment be affirmed.

CULLUM v. BLOODGOOD, FORD, ET ALS.

1. R & F, partners, having raised money by the acceptance of Bloodgood, placed in his hands for his protection, four bills of exchange, drawn for the accommodation of R & F, by B, C, E and H. Bloodgood was compelled to pay his acceptance, and the bills of B, C, E and H, were also dishonored. R then placed in the hands of an attorney, a large amount of notes on third persons, and gave written directions, that the money, when collected, was intended to secure Bloodgood, C, E and H, and two other persons who are mentioned, B, the drawer of the other bill, who was not mentioned, having claims of R & F in his hands, on which he claimed a lien for his protection, and which he subsequently delivered up to Bloodgood, upon an understanding with him, that he was not to be held responsible on his bill. The attorney collected a portion of the money, and appropriated it according to the written directions, of which an account was rendered. Subsequently, Bloodgood brought suit against C, E and H, on the dishonored bills, and recovered a judgment against each, less than the amount of the bills, the account being present, and being made the basis of the judgment, which judgment was afterwards revived by *scire facias*. C afterwards filed his bill, alledging a loss by neglect of Bloodgood, and especially insisting upon an account by Bloodgood, of the claims received by him from B. Held, first, that the defendants to the suits at law, were concluded by the judgments at law, from opening the account in equity. Second, that as the accounts were all on one side, and not complicated, equity would not take jurisdiction on the score of account, a trial having been had at law, and no sufficient excuse being shown for the failure to defend there.
2. Each partner possesses an equal, and general power, in behalf of the firm, to pledge, exchange, or otherwise dispose of the partnership effects, for any, and all purposes within the scope of the partnership. One partner may assign property for the benefit of one, of several, or of all the joint creditors. Whether one partner can make a general assignment, of *all* the partnership effects, *quere*.

Error to the Court of Chancery sitting at Mobile. Before the Hon. A. Crenshaw, Chancellor.

THE bill which was filed by the plaintiff in error, alledges, that in the year 1836, the firm of Ross & Ford was indebted to John Bloodgood, in the sum of $25,000, for money which he had been compelled to pay for them as acceptor on certain

bills of exchange. That for the purpose of discharging this liability, said firm of Ross & Ford, applied to Cullum, (the plaintiff in error,) John F. Everitt, Joseph Bates, and one Wait S. Hoyt, for the use of their names, on certain bills of exchange, as follows: Everitt's bill for $6,537 25; Cullum's for $6,423 25; Bates's for $6,320 18; and Hoyt's for $6,226 28; all of which became due in 1837, and were accepted by Ross & Ford, and all of which were delivered to said Bloodgood in discharge of said indebtedness, he knowing that these bills were made for the accommodation of Ross & Ford. These bills were all protested, and the parties thereon became liable to pay the several amounts due thereon.

That on the 21st February, 1837, Ross & Ford, for the protection and indemnity of said Bloodgood, and of plaintiff in error, and the said Everitt, Bates, and Hoyt, delivered to one Charles Dellinger, the authorized agent of Bloodgood, divers notes, amounting to the sum of $29,459. That the said Bloodgood proceeded at law against the said Everitt, and Hoyt, and recovered judgment against them on their respective bills, or drafts, and also against plaintiff in error for the amount of his bill, and recovered a judgment for $6,423 78, with interest, costs, &c., and execution has issued thereon. That Bloodgood has not prosecuted any suit against Bates, because, as he alledges, the liability of said Bates has been extinguished, by the application thereto of certain notes, made by one Dumas, and others, in favor of Ross & Ford, and charges that Ross & Ford, never authorized Bloodgood to make any such application of said notes, but that the application should have been made rateably, on the whole debt of Ross & Ford.

That when the said notes were transferred to Dellinger, the parties were all solvent, and that he has collected and realized the same, but has made no appropriation thereof to the credit of Ross & Ford, or to the discharge of the bills drawn by plaintiff in error, Everitt, Bates & Hoyt.

He further charges, that he is ignorant of the true state of the accounts, but believes, and charges, that a sufficiency has been collected, to pay off and discharge the bills drawn by plaintiff in error, Bates, Everitt & Hoyt, and if not, that it has been lost by his neglect. The prayer of the bill is for

an injunction against the judgment at law, for an account, and for general relief.

Accompanying the bill as an exhibit, is the receipt of Dellinger, "Mobile, February 21st, 1837. Received of Messrs. Ross & Ford, the following bills to collect, being collateral security for certain sums due John Bloodgood, of New York;" then follows a list of the claims, amounting to $29,459 54.

Bloodgood answered the bill, and states, that Jack F. Ross, of the firm of Ross & Ford, applied to him to raise money through his (defendant's) drafts on New York, defendant to be reimbursed for money advanced to Ross, received from Ross, the four drafts of complainant and others, described in the bill. That they were not paid at maturity, and he having negotiated them, was compelled to take them up. That the notes specified in the exhibit, were delivered by Ross, to the law firm of Gordon, Campbell, & Chandler, in February, 1837. That said Ross, left with said firm, written directions, which after describing the notes, proceeds thus: The above notes, are intended to secure Mr. Bloodgood, and the parties to the following paper, viz: John F. Everitt's bill, C. Cullum's bill, W. S. Hoyt's bill, (which are described, and are the same mentioned in the bill of complaint.) Also, Ross, Hoyt & Ford's bill, on William Bloodgood, dated 7th November, 1836, at sixty days, for $6,000; and one other, dated 23d November, 1836, at sixty days, for $2,000. That said papers were placed in the attorneys' hands, with these instructions, and when any collections were made, these instructions were produced as their guide, in the application of the money.

The defendant attaches to the answer as an exhibit, an account current, showing all the collections that have been made, and the application of the money. This account was rendered before the judgment was obtained against the complainant; the original was before the court on the trial of the cause, and constituted the basis of the judgment then rendered. There was a full trial of one of the causes, and by an arrangement they were all decided on the same evidence.

In regard to the draft of Bates, he states the fact to be, that Bates held the notes on Dumas, for his own personal security, and by arrangement with Bates & Ross and Ford,

the Dumas notes were placed in the hands of lawyers for collection, and when collected to be applied in payment of the draft of Bates, in the hands of defendant; but that this arrangement was entirely separate, and distinct from the other, having no connection with it.

The judgment against plaintiff in error bears date 21st May, 1840, and is for the sum of $5,472 12, which was revived by *scire facias* on the 3d December, 1844, both of which are in full force, and have not been satisfied, or paid off. That the collections made by defendant, were all made prior to the judgments, and he then states the condition of those which have not been collected. That in making out his account current, an error intervened, which he afterwards corrected, but which by mistake was overlooked, and he is willing now that the judgment should be considered as if entered for the true sum, viz: $3,430 38.

That he is informed no more can be collected on the Dumas notes, and that the loss on the Bates debt is greater than it would have been, if his claim had been put on the same footing as the others.

Testimony was taken, which, so far as it is important, is adverted to in the opinion of the court.

The chancellor considered that there was no equity in the bill, as the complainant could have made his defence if it existed, upon the trial at law; but as the defendant admitted a mistake in the judgment, and offered to correct it, he directed the correction to be made. This decree is now assigned as error.

A. F. Hopkins and P. Hamilton, for plaintiff in error.

1. The bill charges, that the four bills aforesaid, which Bloodgood held were known by him to have been drawn for the accommodation of Ross and Ford, when he received them from Ross & Ford. As his answer does not deny his knowledge of this fact, it is in effect admitted by him. 1 Porter's Rep. 375; Lecatt v. Sallee, 3 Porter, 125. As the acceptors of the bills passed them to John Bloodgood, before the maturity of them, Bloodgood had constructive notice that they were drawn for the accommodation of Ross & Ford. Wallace v. The B. Bank at Mobile, 1 Ala. 565.

2. The directions constituted no contract, for they were given by Ross alone, who had no authority to give them to the attorneys, who were no parties to the only contract which existed upon the subject, and who, by their receipt for the notes, recognized rights in Dellinger, to which the authority of Ross to give the directions was in direct opposition.

3. After the execution of the receipt by Dellinger, the implied trust created by it in favor of the complainant, could not have been impaired or altered without his assent, if Ross & Ford and Bloodgood had all agreed, that Wm. Bloodgood should receive from the collaterals, what had been improperly paid to him. Fell on Guarantees, 216, § 8; 214, § 6; 3 Atk. Rep. 91; 4 Vesey, jr. 824, 829.

4. The complainant is entitled in equity to his share of the proceeds of the collateral security, which have been applied with the approbation of Bloodgood, the defendant, to the payment of the debt due to Wm. Bloodgood, from Ross, Hoyt & Ford. The effect of this application was, to diminish. by the authority of the defendant, Bloodgood, a security to the benefit of which the complainant was entitled. The complainant has a right in equity to a discharge from his bill of exchange, to the extent of his share in the sum which was paid from the proceeds of the collaterals, to Wm. Bloodgood. 1 H. Black. Rep. 123, 136. The defence of the defendant is an equitable one, of which a court of law has no jurisdiction. McBroom v. The Governor, 6 Por. R. 45; 1 H. Black. 123, 136, note 1.

5. The attempt to make, and the failure of an equitable defence at law, does not preclude the unsuccessful defendant at law from the relief to which he is entitled in equity. McClure and others v. Colclough and others, 5 Ala. Rep. 65; 1 H. Black. R. 123, 136; 1 Wash. C. C. Rep. 320; 10 Gill & Johns. 404, 418.

6. The acceptance of the notes of Dumas by Bloodgood, the defendant, in discharge of the bill drawn by Bates, made the whole proceeding of the collateral security applicable to the three other bills, of which that drawn by complainant is one.

J. A. Campbell, contra.

1. The plaintiff is concluded by the judgment at law from insisting upon the misapplication of the payments, even if such had been made. The defence should have been made upon the trials at law. 1 Vernon, 176; 10 Peters, 497; 1 Stew. 107; 6 Port. 24; 5 Ib. 547; 1 Ala. 103; 2 Ib. 21; 8 Por. 432; 7 Ib. 549.

2. The party has acquiesced in these arrangements unduly, and will not be permitted now to disturb them. Rights have vested, and settlements have been concluded upon the basis of this account, and injustice would be done by an interference. This proposition is true, even in regard to accounts which grow out of trusts, and for a much stronger reason, when the errors complained of consists of the application of moneys. 3 Johns. Ch. R. 569; 1 Bald. 394, 418; 2 Ed. Ch. R. 1.

3. We are not required to account to Cullum; Ross & Ford never having claimed one. Tripler v. Olcott, 3 Johns. Ch. R. 473.

COLLIER, C. J.—The complainant and Everett, Hoyt, and Bates, with the view of reimbursing the defendant, John Bloodgood, about twenty-five thousand dollars, which he had advanced for Ross & Ford, drew four several bills on the latter; these bills were accepted, and the acceptors failing to meet them at maturity as they had undertaken, they were protested for non-payment. In order to protect the complainant and the other drawers of the bills, and to indemnify Mr. Bloodgood, Ross & Ford placed in the hands of C. Dellinger, the agent of Mr. Bloodgood certain notes and other securities, for money due them from third persons, amounting to about $29,000. These securities have been realized, and notwithstanding their collection, Bloodgood has made no appropriation of their proceeds to the payment of the bills; but has recovered judgments against the complainant and Everett and Hoyt, and is seeking to enforce the judgment against the complainant. The bill particularly alledges these facts, prays that an account be taken, and that the judgment against the complainant be perpetually enjoined.

Conceding that the allegations of the bill are founded in truth, and they show that the complainant had a defence

which he might have asserted at law. They affirm a contract between Ross & Ford and Bloodgood, through his agent Dellinger, to apply the collections made upon the collateral securities to the payment of the bills. This contract was not for the exclusive benefit of the acceptors, but inured also to the drawers, and it was competent for the latter to show the amount collected, and insist upon its appropriation to the extinguishment of their liabilities. To have made out the defence it was not necessary at law, any more than in equity, to prove that the money collected, went into Bloodgood's hands—the receipt of it by his attorneys at law, would be as effectual in one court as the other. In either case it would be money received for the use of the party, to whose benefit it was to be applied, and if it was converted to other purposes by Bloodgood, or his agents, it was no less a payment under the contract, in virtue of which the securities were delivered.

This being the case, we can conceive of no objection to the legal defence. It has been repeatedly held, that where money is deposited with one person to be handed to another, or where money is received by a trustee under an assignment for the benefit of creditors, in either case the beneficiary may maintain an action for money had and received. Hitchcock et al. v. Lukens & Son, 8 Port. Rep. 333; Stewart v. Conner, 9 Ala. R. 803; Huckabee v. May, 14 Ala. 263, and citations there found.

But it is insisted that the equity of the bill is defensible on the ground that the controversy embraces matters of account between the parties. It must be admitted, that "in matters of account, growing out of privity of contract, courts of equity have a general jurisdiction where there are mutual accounts, (and *a fortiori* where those accounts are complicated;) and also where these accounts are on one side, but a discovery is sought, and is material to the relief. But on the other hand, where the accounts are all on one side, and no discovery is sought or required; and also where there is a single matter on the side of the plaintiff seeking relief, and a mere set off on the other side, and no discovery is sought or required, in such cases courts of equity will decline taking jurisdiction of the case." 1 Story's Eq. 441; Kirkman et al. v.

Vanlier, 7 Ala. Rep. 217 and cases there cited. In the case at bar, the complainant's indebtedness was ascertained by the bill which he drew, and if any part of the transaction in question rested in account, it was the collections made by Bloodgood on the collateral securities. Here then the accounts are all on one side—by no means complicated, and from any thing alledged in the bill, we cannot infer that a discovery is necessary. It should rather be inferred from the manner in which the complainant has stated his case, that the proof was accessible through the debtors of Ross & Ford, whose debts were transferred, or the attorneys to whom the collection of them was entrusted. The case then does not come under the head of equity jurisdiction, which the parties have invoked. See also, Halstead v. Rabb, 8 Porter's Rep. 63; Poage v. Wilson, 2 Leigh's Rep. 490; Knotts v. Tarver, 8 Ala. Rep. 742.

It is a general rule, so well established as to have become an axiom, that a court of chancery will not entertain a cause where the complainant has a plain and adequate remedy at law. Where no circumstances of surprise, accident, or fraud, appear to have prevented a party from having a full and fair trial at law, upon the matters which form the ground of his application to equity, an injunction will not be granted. Holding v. Holding, 1 Murp. Rep. 10. After a cause has been fully tried and decided in a court of law, equity will not give relief. So where a defence is purely legal, and the defendant was advised, or might have become informed of it with proper diligence, and was under no disability, equity will not interfere, if he failed to avail himself of it. In such case it devolves upon the complainant to show some sufficient excuse for the failure to defend himself. Perhaps, if the defence be one of which the two tribunals have concurrent jurisdiction, and the defendant fails to assert it at law, he may notwithstanding resort to a court of equity; but if he attempts to defend himself in the former tribunal, and fails, he cannot have the matter retried in the latter. Harrison v. Harrison, 1 Litt. Rep. 137; Morrison's Ex'r v. Hart, 2 Bibb's Rep. 4; Wilson v. Cheshire, 1 McC. Ch. Rep. 241; Morris v. Ross, 2 Hen. & M. Rep. 408; Vanlew v. Bohannan, 4

Rand. Rep. 537; French v. Garner et al, 7 Por. Rep. 549; Lee & Norton v. Ins. Bank of Columbus, 2 Ala. R. 21; Pharr & Beck v. Reynolds, 3 Ala. Rep. 521; Stinnett and another v. The Branch Bank at Mobile, 9 Ala. Rep. 120; Duncan v. Lyon, 3 Johns. Ch. Rep. 351; Murray v. Toland, Id. 569. The principles we have stated are quite sufficient to show, that the bill does state a case which entitles the complainant to relief in respect to the collateral securities delivered to the agent of Bloodgood.

If the complainant was entitled, under a contract with Ross & Ford, to have any part of the sum collected on the notes of Dumas, appropriated to the extinguishment of his liability as drawer of the bill, for the accommodation of the acceptors, he might have reduced the amount of the judgment against him, *pro tanto*, by making his defence before a jury. The bill does not distinctly alledge such to have been the fact; and if we look out of the bill to the answer of Bloodgood and the proofs, the reverse is most manifest. It is perfectly clear, the transaction between Ross, Bates & Campbell, in respect to these notes, was intended to transfer to Bates a special lien upon a sufficient amount of the proceeds, to extinguish his liability as an accommodation drawer for Ross & Ford. Such too, must be its legal effect, unless it was indispensable to the validity of the arrangement, that it should have had the sanction of Ford.

Mr. Justice Story, in his Treatise on the Law of Partnership, (§ 101,) says, "each partner *virtute officii*, possesses an equal and general power and authority in behalf of the firm, to transfer, pledge, exchange, or apply, or otherwise dispose of the partnership property, or effects, for any and all purposes within the scope and objects of the partnership, and in the course of its trade and business. The power extends also to assignments of property of the firm, as a security for antecedent debts, as well as for debts thereafter to be contracted on account of the firm. Nor will it make any difference, whether the assignment be for the benefit of one creditor, or of several, or of all the joint creditors." But the learned author concedes, that "it may well admit of some doubt, whether this power extends to a general assignment of all the funds and effects of the partnership by one partner for the

benefit of creditors." Id.; see also, citations in the notes; also, § 126, and citations in notes. In Egberts v. Wood, 3 Paige's Rep. 517, the right of either of the partners, before the dissolution of the partnership to apply the funds of the firm to the payment of one creditor to the exclusion of another, is distinctly recognized. If this be the law, and we believe that there is no conflict in the decisions upon the point, it was entirely competent for Ross, without the concurrence of Ford, to have made such a disposition of Dumas's notes as entitled Bates to the money collected on them for his indemnity. The proof entirely relieves the transaction from suspicion, or *mala fides*, on the part of either of the parties, and there is no ground on which a court of chancery can deny to it validity.

This view relieves us from the necessity of considering the questions which have been raised as to the lien of the several partners upon the effects of the firm, for the partnership debts, and how far this lien may be made available at the the suit of a creditor. See, however, Story on Part. §§ 97, 132, 133, 259, 260, 263, 326, 357 to 361, 390, 391; Tripler v. Olcott, 3 Johns. Ch. Rep. 473. We will not stop to inquire whether, if a proper case for equitable interference, was made out, the defendant has not slumbered too long upon his supposed grievances.

The questions considered are the only ones presented by the bill, and upon these we have already said, the complainant is not entitled to the relief he seeks. The decree is consequently affirmed.

LINDSAY AND ATKINSON v. THE STATE.

1. An instrument, with a scroll attached to the name of each of the signers thereof, having the word "seal," written within, and in which the par-

ties "bind and oblige themselves" &c., and use the terms, "the condition of the above obligation" &c., and which provides, that, upon performance of the condition, "the above obligation to be void," imports on its face to be under seal, and will be taken, deemed and held to be a sealed instrument.

2. The continuance of a cause is a matter of discretion with the primary court and is not revisable on error.
3. A judgment will not be reversed for an error that works no injury to the party against whom it is committed.
4. A judgment *nisi* on a forfeited bond which recites, that the defendant, to secure whose appearance such bond was executed, "being called, came not, but made default, "without specifying the particular charge, that he was called to answer, is fatally defective and a judgment final rendered theron is erroneous.

Error to the Circuit Court of Coffee. Before the Hon. E. Pickens.

This was a proceeding on a forfeited recognizance, at the instance of the State against the plaintiffs in error, as the securities of one Gardner Hardy. The recognizance is as follows:

"*The State of Alabama, Coffee county*—Know all men by these presents, that we, Gardner Hardy, B. T. Atkinson, John Lindsay, Wesley Lightfoot, Henry Polson, and George Kilpatrick, are held and firmly bound unto Benjamin Fitzpatrick, Governor of this State, and his successors in office, in the penal sum of one thousand dollars, for the true payment of which we bind ourselves, our heirs, executors, administrators, and assigns, jointly and severally, firmly by these presents. Signed with our hands, and dated the 18th Oct. 1843.

The condition of the above obligation is such, that if the above bound Gardner Hardy shall appear before the Honorable the Judge of the Circuit Court, at a court to be holden for said county, on the first Monday after the 4th Monday in March next, at the place of holding the same, then and there to answer to a bill of indictment pending against him, the said Gardner Hardy, for an assault with intent to commit murder, and attend from day to day, and from term to term,

until discharged by a due course of law, then the above obligation to be void, otherwise to remain in full force and virtue.

GARDNER HARDY, [seal.]
B. T. ATKINSON, [seal.]
JOHN LINDSAY, [seal.]
WESLEY LIGHTFOOT, [seal.]
HENRY POLSON, [seal.]
GEO. KILPATRICK, [seal.]

Signed, sealed, and delivered, the day and date above written, in presence of JOHN T. MOODY, sheriff.

At the spring term, 1844, the said recognizance was forfeited, and judgment *nisi* entered thereon, upon a *scire facias* issued. At the return term of the *scire facias* the parties appeared, when a motion was made to quash it, which motion was sustained, and the cause continued, &c. An *alias scire facias* was thereupon issued, and on its return was also quashed on motion. The solicitor for the state then moved the court to enter a judgment *nisi*, *nunc pro tunc*, which was granted. The amended judgment *nisi* recites, "and now comes, &c. and the defendant Gardner Hardy being called came not but made default," without specifying the offence which he was called to answer. A *scire facias* issued on this amended judgment *nisi*, and at the return term thereof, the plaintiffs, they alone having been served, appeared to quash the *scire facias*, which motion was overruled. The plaintiffs then showed cause why the said judgment *nisi* should be reduced to two hundred dollars, which was satisfactory to the court, and judgment final was accordingly rendered for that amount.

The plaintiffs now assign as error—

1. That the instrument set out in the record as a recognizance, is not a sealed instrument, and the court erred in rendering judgment upon it.

2. That the court erred in continuing the cause after the first *scire facias* was quashed, no motion to amend having then been made.

3. That the court erred in giving judgment final when the judgment *nisi* did not set out the offence which the said Gardner Hardy was called to answer.

SEMPLE, for plaintiffs in error.

1. No instrument is really a bond, unless it be sealed, and of this evidence must appear on its face; neither a declaration in the body of the instrument, that it is sealed, nor a scroll attached, is of itself and alone sufficient. It must be stated to be sealed, and some act, such as a scroll, attached, must attest that it is sealed. In this case we have only the scroll, and the instrument on its face does not show to us what was meant by the scroll. No other words can supply the place of the word seal, or sealed. See Henderson v. Ross, Minor's R. 421; Lea v. Adkins, Ib. 184; Austin's Adm'r v. Whitlock's Ex'r, 1 Munf. 487.

2. The statute of our state gives the court power to permit an amendment, but in this case no amendment was made, but after demurrer sustained to the *sci. fa.* instead of an amendment being made, the cause was continued, and a new *sci. fa.*, a different declaration was filed.

3. The judgment *nisi nunc pro tunc* does not set out that the defendant, Hardy, was called to answer the charge of the indictment, and until this was done, there could be no forfeiture or breach of the condition of the recognizance. See Howie and another v. The State, 1 Ala. 113; Farr & Simpson v. The State, 6 Ala. 795; State v. Hinson, 4 Ib. 671; Badger et al. v. State, 5 Ib. 21.

BALDWIN, Attorney General, for the State.

I. The instrument called a recognizance, imports on its face to be a sealed instrument.

1. "A recognizance is an obligation of record, entered into before some court of record, or a magistrate duly authorized, with a condition to do some particular act."

2. The recognizance contains these words, to wit: "The condition of this obligation is such," and again, "then this obligation to be void."

3. An obligation is a word of large extent, but is usually taken, in the common law, for a bond, containing a penalty, with condition for the payment of money, or to do some act or thing. 7 Bac. Ab. 236.

4. Three essentials to an obligation—one is, that it must be sealed. Pamph. Acts 1839, p. 99; Williams, use, &c. v.

Young, 3 Ala. 145; Bancroft's Adm'rs v. Stanton, jr. 7 Ib. 350.

5. If the instrument be really sealed, although it is not said in the body of it, that the parties have set their hands and seals, it is nevertheless a sealed instrument. Taylor v. Glaser, 2 S. & P. 502; Meredith v. Hinsdale, 2 Caine's Rep. 362; Jeffry v. Underwood, 1 Ark. R. 108; Bertrand v. Bird, 4 Ib. 195; Cummins v. Woodruff, 5 Ib. 116; contra, two cases in Minor's Rep. 187, 421.

II. The cause was not continued, so far as the *scire facias* was concerned, for the record shows, that that demurrer was sustained, and *scire facias* quashed. Besides, this was before the judgment *nisi nunc pro tunc*; all proceedings before that were set aside, and of course the defeneant can't complain of that.

III. The judgment *nisi* recited in the *scire facias* shows, that the defendant gave bond to appear and answer an indictment for an assault with intent to murder, "and that he failed to appear and answer said bill of indictment," after being called. The crime which he was called to answer is sufficiently set forth. See difference between this case and the one against Farr et al, reversed for not reciting the crime defendant was called to answer. Farr et al v. State, 6 Ala. 795. There is as much certainty in setting out the crime for which defendant was called to answer in this *scire facias*, as is required in stating the breach in an action of debt. Howie and Morrison v. State, 1 Ala. 113.

IV. The offence being a technical one, a bond to appear and answer that offence is sufficient, without setting out the particulars of the offence. A bond to appear and answer an indictment for an assault and battery is good, without stating upon whom the assault was committed. Bond to appear and answer the crime of larceny is good, without stating whose goods were stolen. Goodwin v. Governor, 1 S. & P. 465.

V. Defendants show cause to the court why the amount of the recognizance should be reduced from $1,000 to $200. Is not this tantamount to a confession of judgment and release of errors. Dig. 447, § 15; Commonwealth v. Offner,

2 Virg. Cases, 17; McMechen v. The Mayor, 2 Har. & J. 41.

CHILTON, J.—1. The objection taken to the bond executed by the defendants for the appearance of the prisoner, Gardner Hardy, namely, that it is not a sealed instrument, cannot be allowed to prevail. The cases relied upon by the counsel to sustain it, of Henderson v. Ross, Minor, 421, and Lea v. Adkins, Ib. 187, do indeed support his position, and the principle there decided has since been recognized by this court. Carter v. Penn, 4 Ala. Rep. 140. Which last case was one in which the parties to the instrument had given no intimation in the body thereof of their intention to seal it, or to regard it as a writing obligatory. But it will be observed, the cases relied upon, were decisions under the law as it stood before the passage of the act of 1839, which changes the law, and declares, that "all covenants, conveyances, and all contracts in writing, which import on their face to be under seal, shall be taken, deemed and held to be sealed instruments, and shall have the same effect as if the seal of the party or parties were affixed thereto, whether there be a scrawl to the name of the party or parties, or not."

We cannot well mistake the design of the parties with respect to the execution of the instrument before us, as on the face of the instrument it clearly imports to be sealed. 1. They characterize it by the use of technical language, which can alone be descriptive of sealed instruments. They "bind and oblige themselves," &c.—they speak of "the condition of the above *obligation*," and upon performance of the condition, provide "the above *obligation* to be void." Besides—2. The six signers of the instrument, opposite each of their names, have added the word "seal," written in the usual form within a scroll. We think it too clear to admit of any doubt, that the instrument on its face purports to be sealed, and that the parties so intended it. At common law, it was not necessary that it should be stated in the instrument, that it was sealed and delivered, because these, says Lord Coke, were things which were done afterwards. 2 Co. 5, a; Tol. Law Dic. Tit. Bond. Since the common law formality of sealing by impressions upon wax, or other impressible sub-

stance, has gone into disuse, the courts, while they cannot disregard such technicalities as have become interwoven with the jurisprudence of the country, are disposed, nevertheless, to look to the instrument as ascertaining the intention of the parties with respect to its character, rather than to the *formula* of sealing, by scrolls and circumflex lines, opposite the signature.

2. It is insisted, in the second place, that although the statute conferred power on the court to authorize an amendment of the *scire facias*, yet the court erred in continuing the cause after the demurrer was sustained, no motion being made to amend. It appears by the record, that on motion of the defendants, the *scire facias* was quashed, and an alias *scire facias* was ordered to issue upon the original judgment *nisi*, and the cause was continued—afterwards, upon the return of the alias, on motion of the defendants, it was likewise quashed by the court. Thereupon the solicitor for the state obtained leave to enter a formal judgment *nisi nunc pro tunc*, which was done, and the *scire facias* upon which the final judgment was rendered, was issued upon this amended judgment, and in our opinion cannot be affected by any erroneous action of the court in respect to the writs that were quashed. The continuance of the cause after the writ, which was the foundation of the proceeding, had been quashed, amounted to nothing. The court decided for the defendants as to the two first writs, and as the proceedings under the amended judgment have no connection with the proceedings under the original judgment *nisi*, which terminated in favor of the defendants, they cannot be heard to complain, that an error intervened in the prior proceeding, so as to reverse the judgment upon the latter. Aside however from this view, the continuance of causes is matter of discretion in the primary court, and not revisable on error; but if it were not discretionary in this case, and we could revise it, still it is clear the defendants have sustained no injury. That there was error is not sufficient—the plaintiff in error must show that he sustains injury thereby. Such have been the uniform decisions of this court.

3. It is contended for the defendants in the judgment, that

the *scire facias* and judgment *nisi* were defective in not setting forth that the defendant was called to answer the charge specified in the indictment and recognizance.

The judgment, as the same was amended, recites, that the said Gardner Hardy, (the principal in the bond, and for whose appearance the same was conditioned,) "*being called, came not, but made default.*" It fails to set forth that he was called to answer any particular charge, and in this respect the proceeding is fatally defective.

In Howie and Morrison v. The State of Alabama, 1 Ala. Rep. 118, the point is expressly decided, and it was there held, that it should appear by the judgment *nisi*, that the accused was called to answer the charge which his recognizance had stipulated he should answer, so that it might appear the party had forfeited his recognizance. In that case the bond was conditioned that the party appear and answer a charge for counterfeiting a certain draft, &c., particularly describing it. The defendant was called to answer an indictment for *forgery*. The court held the judgment did not show a default for which the recognizors should be held liable. The default against which they had stipulated was for his failure to appear and answer a particular offence, the forging a certain draft, which the recognizance described, while the default of record was for failing to appear and answer for the forgery generally. It might be for the offence described in the recognizance, or for any other act coming within the appellation. The case at bar is much stronger for the defendants. Here, the recognizance is, "to appear and answer an indictment for an assault with intent to commit murder,"—the default is, that the defendant, Hardy, was called, but for what purpose does not appear. It is very clear that there can be no default until Hardy fails to appear, when called to answer the charge for which he has been recognized. The case of Farr and Simpson v. The State, is also in point, to show the proceedings had in this cause cannot be sustained. See 6 Ala. 794. Also, authorities on the brief of plaintiffs in error.

It is true, as insisted by Mr. Attorney General, that the judgment *nisi* recites, that the defendant failed to appear and answer the bill of indictment, recited in the bond, &c.; this

is true, but does not answer the objection, that *he was not called* to answer it. He was merely called to come into court—not called to answer, and until this is done, he is not in default, though he fail to answer as the record recites.

The record does not show a confession of judgment for the $200. The defendants showed cause why the judgment *nisi*, &c. should, in the opinion of the court be reduced to that sum. By no rule of construction could the language employed be considered a judgment by confession.

It follows, that the court below should have quashed the *scire facias*, which upon its face, shows the proceedings to be erroneous.

The judgment is therefore reversed, and the cause is remanded.

BRANCH BANK AT MOBILE v. STROTHER.

1. All debts due the bank, after maturity, carry interest, at the rate of eight *per cent per annum.*
2. The banks of this State, cannot discount notes, or bills, at the rate of eight *per cent per annum*, having a longer period to run than twelve months: nor can they extend a debt due them, and charge interest by way of annual discount, in advance. They may discount a bill, or note, having more than twelve months to run, by ascertaining the present worth of the note. or bill, at eight *per cent*, for the time it has to run.
4. A discount of a note, made by calculating the interest for one year, and multiplying this sum by the number of years the note has to run, and deducting the amount thus ascertained, from the amount of the note, is illegal, whether made by a bank, or by an individual.
4. The statute of limitations will not apply, because a part of the debt has been paid. The complainant's right to relief exists, whilst the debt continues, and the payment of any portion of it, will be applied to the payment of the principal, and lawful interest.
5. A recognition in the bill, of the liability of the complainant to pay the amount actually due, and lawful interest, and a submission to pay this

sum as the court shall direct, invests the court with jurisdiction to render a decree against him, for the proper amount.

6. It is no ground for a reversal, that a reference to the master was prematurely made.

Error to the Chancery Court of Mobile. Before the Hon. A. Crenshaw, Chancellor.

The defendant in error filed his bill against the plaintiff, alledging that on the 12th day of February, 1840, he was indebted to the bank, either as principal or surety, in the sum of $29,966 09. That on that day he extended the debt, giving security, and executing six notes, payable on the 1st of February of each year, one due at one year, and one falling due each successive year.

The note due in Feb'y 1841, was for	$4,340	44
The one due " 1842,	4,752	52
The one due " 1843,	5,252	32
The one due " 1844,	8,787	07
The one due " 1845,	9,955	41
The one due " 1846,	11,482	38

The bill also alledges, that the three first of these notes have been entirely paid, and considerable payments have been made on the fourth and fifth. The whole amount paid being $25,493.

The bill further alledges, that in taking the new notes, and casting the interest thereon, errors have been made, greatly to the prejudice of the complainant, and that the debt has been increased beyond the amount due for principal and interest. It is shown by an exhibit to the bill, that the sum of $29,966 09 was divided and extended, in the following manner:

In the first note was included,	$4,000	00
The interest charged for one year,	340	44
In the second note was included, of principal,	4,000	00
The note due in two years, interest charged,	752	50
In the third note is included, of principal,	4,000	00
Due in three years, interest charged,	1,252	50
In the fourth note is included, of principal,	5,998	69
Interest charged, four years,	2,798	02
The fifth note includes, of principal,	5,998	69

Interest charged for five years, ... 3,955 39
In the sixth note was included, of principal,..... 5,988 69
Interest charged for six years,.... ..... 5,493 69

The bill also alledges, that this overcharge of interest, was the result of mistake, or if the bank knowingly, or wilfully charged the amount specified, it would involve them in the crime of usury, and extortion. That complainant has but since the last term of this court discovered the error. That he does not wish to avoid any portion of the debt, and the lawful interest; that he recognizes his liability to pay the principal, and all lawful interest, and seeks only to correct the error. The bill also states, that the complainant has submitted this subject to the bank, but that it declines to rectify the error.

The bill prays an account, and that the amount overcharged be credited to complainant; and he submits that it be entered as a credit on the last note, and that the amount due now, complainant may be permitted to pay on the terms of the act of assembly, in regard to bank debts, or on such other terms as shall be considered proper by the court.

The answer of the bank admits that the complainant was indebted at the time stated, in the sum of $29,960 69, on the 12th February, 1840, and that on that day he made an arrangement with the bank, by which the amount was settled, by giving new notes to be discounted by the bank, in such amounts as would produce the sum then due in cash; that a calculation was made at the time, from which it appears, that the notes tendered by him for that purpose should be for the amounts specified in the exhibit to the bill. The answer also alledges, that it was agreed and stipulated at the time, that the new notes should be discounted in this manner, and they were made for the amount expressed in them, in order to produce the nett amount of the debt, after deducting the discount. The answer also admits, that complainant has paid $28,401 27, and avers, that if the new notes are for more than they were entitled to receive, it was the result of mutual mistake between the complainant and respondents, and denies all intent to exact more than legal interest. The answer also contains a demurrer to the bill.

Before any decree was made by the chancellor, a reference

was ordered to the register, to state the accounts between the parties. The language of the reference is, "the court orders the bill and answer to be referred to the register to state an account between the parties, as follows: to ascertain the amount due the defendant, allowing a discount of six per cent on all the notes, except the first, and on that a discount of 8 per cent. Also, to ascertain the amount that would be due, allowing interest on the debt at 8 per cent., and to report on what principle the notes were taken, as stated in the answer."

The result of the report of the register is, that taking off discount, at 8 per cent. from the notes, for the first year, and 6 per cent. discount for the residue of the time they had to run, the nett amount in cash they would produce on the day of discount, would be the amount admitted to be due the defendant, by complainant, on the day of settlement—that is, the notes thus discounted on the 12th of February, 1840, would produce in cash $29,966 69; and deducting from the notes the amount admitted to have been paid, and supposing the mode of settlement stated in the pleadings to be correct, there is due on the 9th April, 1846, to respondents, $18,931 24. That to allow the respondent interest on the original debt at the rate of eight per cent. per annum, and to credit him with the payments admitted to have been made, and first extinguish the interest due at the time of each payment, and credit the balance of the payment on the principal, and there is due to respondent, $14,662 14. The difference in the two modes of settlement, that is, between the mode adopted by the bank, and the mode of settlement allowing 8 per cent. interest, is $4,269 18.

The cause was heard on bill, answer, and the report of the master, and no objections to the calculations of the master being made, the chancellor decreed that complainant be allowed as a credit, the sum of $4,269 18, to be placed on the note last due.

From this decree a writ of error is prosecuted to this court. The errors assigned are—

1. That the demurrer should have been sustained.
2. That no reference to the master should have been made

until there was a decree setting forth the equities between the parties.

3. That the order of reference does not call for such a report as would ascertain the equities between the parties.

4. That the report does not pursue the reference, but varies from it.

5. Decree allowing the complainant the credit.

J. W. Lesesne, for plaintiff.

J. A. Campbell, for defendant in error.

J. P. Strother, in 1840, as principal and surety, was indebted to the Branch Bank at Mobile, in the sum of $29,966 06. Much the largest portion of this debt was due as surety for others. He proposed to extend it, and to give new securities. The bank accepted his proposition, but took interest by way of discount.

An exhibit to the bill will show the following results: That on the first year's note the excess was $26 67; second do., $118 73; third do., $298 55; fourth do., $891 21; fifth do., $1,580 43; sixth do., $2,628 28. When I say excess, I mean that these amounts exceed the amount of legal interest on the debt. The principle on which this is accomplished, will appear in a *rhetorical report of the master.* No dispute is made of the fact. The transaction is evidently far more injurious than the charge of compound interest. By the charge of compound interest, a debt is doubled in ten years and a fraction. By the mode of discount, it is doubled in little over six years. The interest paid on the sixth note is above fifteen per cent. per annum. This is ascertained by calculation. These calculations have been made in the report.

A very large proportion of the debt was paid at the date of the bill, and no difficulty exists as to the remainder. This litigation is *bona fide*, to obtain relief from oppressive charges.

The law considers, and experience proves, that eight per cent. is a sufficient compensation for forbearance of a debt.

The rate is exorbitant, when the prices of produce for the last six years are considered. The rule of law is the rule of common sense.

Courts will not allow of changes of law by private agreement. Stipulations for compound interest are only allowed, in a few cases, and under great restriction. There is nothing illegal in the reservation of the right to charge compound interest, yet, because it tends to oppression and injustice, courts of chancery interpose to inhibit it. Breckenridge v. Brooks, 2 A. K. M. 335; Connecticut v. Jackson, 1 Johns. Ch. Rep. 13, 550; 3 Hen. & M. 89; 6 Johns. Ch. Rep. 313; 2 Porter, 351; 2 B. Mon. 336.

The charter of the bank no where allows the discount of notes having a longer time to run than twelve months, and except in two specified cases, the bank is required to charge only at the rate of six per cent. upon its loans and discounts. The case before the court did not fall within the terms of the charter, which allowed the bank to make discounts at the rate of eight per cent. If this discount proceeded from a mistake of law, the court would allow the bank to correct the result, but surely it would not when the debtor does not dispute the debt allow, the bank to retain the excessive charge. 1 Rich. Eq. R. 414; 1 Bailey's Eq. R. 505. In the court below, it was hardly contended that the correction should not be made. The objection taken there was to the frame of the bill. The bill did not offer to pay the balance due.

On principle, it is evident this was not necessary. A party who comes into court asking relief, submits himself to such terms as the court will impose. He assents to do equity. On authority, the point is clear. It is not necessary to make the submission. 4 Eq. Dig. 425, citing 2 Young & C. 15, § 18. There are several authorities to the same effect.

DARGAN, J.—The State Bank and its Branches, are allowed to discount notes and bills, at different rates, according to the time they have to run before maturity; but there is no special law prescribing the rate of interest these debts shall bear after maturity, consequently the interest they bear after they become due, is regulated by the general interest law of the State, and all bear eight per cent.

On the day of the settlement, all the debts owing by the complainant to the bank were due, and all were bearing eight per cent. The agreement was to extend the whole indebt-

edness, dividing it into six annual payments, and notes were given, falling due from one to six years.

The amount of these notes exceeds the debt, and lawful interest added to it, $4,269 18. This charge of interest, over the rate of eight per cent., the plaintiffs in error contend, they had the right to make, and can legally require the defendant to pay, because they are authorized to discount notes at eight per cent., having twelve months to run, and in extending a debt over due, they can charge interest by way of discount; or to discount the note, given in extension of the debt, and apply the proceeds to its payment.

The authorities relied on by the plaintiff's counsel, do hold, that a bank may discount a note, of its debtor, under an agreement to apply the proceeds to the payment of the debt; and even if the note so discounted, be paid by the discount of another, such a transaction is not usurious, unless it was a mere cover to hide usury. The Bank of Utica v. Wagner, 2 Cowen, 712; The State Bank v. Hunter, 1 Dev. R. 100; 9 Mass. R. 49. But we do not think these authorities come up to this case. In none of the cases referred to, had the note a longer period than twelve months to run, before maturity. The period of time the notes had to run before maturity, makes the distinction between this cause, and the cases referred to, and the question is, has the bank the right by law, thus indefinitely to extend the payment of its debts, and charge interest by way of annual discounts? If we affirm that the bank has the right, we must sanction results, that the common sense of all mankind would condemn as oppressive, and unjust. For instance, the note that falls due the sixth year, nearly doubles the principal, and if it had been extended twelve years, it would have nearly quadrupled the principal included in it. Such a rule of computing interest on debts, the payment of which is extended several years, leads to results that cannot be tolerated by law. 2 A. K. Marsh. 335; 1 Johns. Ch. R. 13, 550; 6 Ib. 313.

The length of time then that the note, or bill has to run, becomes a material inquiry, in distinguishing between a legal discount, and an illegal transaction. In none of the cases referred to, did this question arise, for none of the notes had

more than twelve months to run; and I have not been able to find any decisions, that throw much light on the subject, or lay down any settled rule in reference to it. Mr. Chitty merely says, that if bills having two or three years to run, are discounted, and interest thus taken in advance, the transaction would be held usurious; and to the same effect, is the case of Martindale and Marsh, 3 Bos. & Pul. 154.

I will not, therefore, undertake to lay down a rule, that shall govern in every transaction. But as the respondents are authorized by their charter, to discount notes, having twelve months to run, at eight per cent. per annum, and we see that some limit must be fixed to the period of time the note has to run, in order to justify the discount of it at eight per cent. per annum, we feel no hesitation in saying, that the bank is not authorized to discount notes or bills at eight per cent., having a longer period to run than twelve months; nor can they extend a debt due to them, longer than twelve months, and charge interest by way of annual discounts in advance. They may, it is true, extend the payment of their debts to any time, they and their debtors may agree, but if they extend them over twelve months, they can only charge such interest, as any other individual is authorized by law to receive of his debtor. We will not say, that the bank may not discount a note or bill, having longer than twelve months to run, even at eight per cent., if the calculation of the interest to be deducted, be made by the common rules of arithmetic; that is, by ascertaining the present worth of the note or bill, at eight per cent., for the time it has to run. But the discount intended to be interdicted, is calculated in this manner: first ascertaining the interest for one year at eight per cent., on the sum mentioned in the note, and then multiplying the interest for one year, by the number of years the note or bill has to run, and deducting the amount thus ascertained, from the amount named in the note. We should feel no hesitation in saying, that the discount thus calculated, when the note or bill has longer to run than twelve months, is illegal, whether made by a bank, or any individual. If the note or bill had twelve years to run, and was discounted by this rule, every four dollars received by the maker of the note, would in effect yield ninety-six dollars interest. Or a note

of one hundred dollars thus discounted, would give to the borrowor four dollars *only*, although the present worth of a note discounted at eight per cent. for the same period of time, is a fraction over fifty-one dollars, if the discount be calculated by the common rules of *arithmetic*. The mode of computation adopted by the bank, in ascertaining the interest to be charged in this case, was to charge interest at eight per cent. by way of annual discount, for every year the note had to run. That is, for the first year, they ascertained how much the principal in the note would yield, if employed in discounting notes. The second year, they ascertained what the principal and interest, added together, would yield, employed in the same manner, and so on for the number of years the note had to run. If the law would tolerate the extension of a debt, charging interest by this mode of computation to any indefinite period of time, had the debt been extended eighteen years, and the interest cast in the same manner, would it not be legal? Yet, if it had been extended eighteen, instead of six years, the principal, in the last note, would have borne over seven hundred per cent.

The cases referred to in 2 Cowen, and 1 Dev. Rep., although they do in effect hold that a bank may extend a debt, charging interest by way of discount, yet the extension in those cases was for a short time, and even if those decisions are to be relied on as authority, and as affording a correct exposition of the law, we cannot extend the principle recognized by them, to any indefinite period of time, without sanctioning results, that both the learned, and the unlearned, with one voice would pronounce onerous, oppressive and unjust.

If the bank can be permitted to extend a debt over due, and charge interest by way of discount, their contract must not embrace a longer period than one year. If they wish to extend their debts longer, they can only charge interest at eight per cent. per annum.

The counsel for the plaintiff in error, has submitted an able argument, to show, that the bank has not been guilty of usury. It is true, that neither the bank intended to charge, nor the defendant to pay, more than lawful interest, and the over-charge of interest, is the result of an improper mode of calculating the interest, for the time the notes had to run;

and the facts negative the existence of any corrupt intent. To constitute usury, there must be an intent to take more than lawful interest; if more be reserved by mistake, it is not usury. Nor can it make any difference, whether the mistake occurs, by adopting an improper mode of calculating interest, or by erroneously adding, or multiplying figures. 7 Gill & Johns. 44; 10 Id. 300.

I should therefore be inclined to agree with the plaintiff's counsel, that the facts of this case, do not constitute usury; yet, because the bank may not have been guilty of usury, they cannot be entitled to receive the over-charge of interest, but the notes to the extent of the over-charge are void, for the want of consideration, and to this extent is the plaintiff entitled to relief.

But it is objected that the right to relief is barred by the statute of limitations. It must be borne in mind, that the bill is not filed to recover back money paid. The amount that has been paid, whether the excess of interest would constitute usury or not, must be appropriated to the principal and lawful interest. 1 Leigh, 453; 7 Monroe, 596.

The over-charge of interest, which is the foundation of the complainant's right to relief, adheres to the debt, as long as it is in existence, and the payment of a portion of the debt, which the law will apply to the extinguishment of the principal and lawful interest, will not and cannot take away this right to relief. The statute of limitations cannot, therefore, have any influence on the *question*.

It is again said, that the bill is defective, in not offering to pay the amount actually due, and lawful interest. The bill recognizes the liability of the complainant to pay the amount actually due, and lawful interest, and the complainant submits to pay this sum, in such manner as the court shall direct. This we think is a sufficient offer to pay, if the *gravamen* of the bill had been to obtain relief against a debt alledged to be usurious. The reason why it is necessary, in a bill seeking relief against usury, to offer to pay the amount actually due, is, that the court will not interfere, unless the complainant will either pay, or submit, that a decree be rendered against him for the principal and lawful interest, and the court has not the power to render a decree against him, on

his own bill, unless he makes this offer by the bill. The complainant submits in his bill, to pay the amount actually due, in such manner as the court shall direct; he invests the court with jurisdiction to render a decree against him for the proper amount, as fully as if he *had offered* in so many words to pay the amount actually due.

Nor is there any available objection to the decree, that the reference to the master was prematurely made. The usual practice is, to settle the equities between the parties, before a reference is ordered to state the accounts between them. But if the final decree is in accordance with the equity of the case, as made by the bill, answer and proof, it cannot be reversed, whether a reference was prematurely made, or whether one was made at all or not; for no one can complain of an error, or an irregularity, unless such error, or irregularity, is injurious to his rights.

The report of the master is not objected to, as erroneous in calculation. If we were to reverse the decree, that a new reference might be ordered, the report must be the same in amount, and the final decree the same. This view shows, that there is no error that should reverse the decree, growing out of the order of reference, and the master's report. The magnitude of this case, has induced us to examine all the questions presented, and which were necessarily involved in coming to a conclusion deliberately, and the result of our opinion is, that the decree of the chancellor must be affirmed.

COLLIER, C. J.—I concur in affirming the decree of the chancellor, and acquiesce in the argument of my brother DARGAN, as to the frame of the bill, and the proceedings under it. Upon the main question in the cause, I am of opinion that the interest should not have been received by the bank at one time, for more than one year in advance, and that the complainant is entitled to the relief he prays, at least to the extent to which it has been accorded by the chancellor. I have not examined the *data* of my brother, founded upon arithmetical calculations; consequently neither assent to, nor dissent from them. My opinion is restricted to the points which I have here stated.

HAZZARD v. SHELTON.

1. Where the holder declares upon one of a set of exchange, it is not necessary to account for the non-production of the rest; any ground of defence which may arise in reference to another of the set, it devolves on the defendant to make.
2. An allegation in a declaration, "that the notary, *at, &c. aforesaid*, made diligent search, and inquiry for the said acceptor," is a sufficient allegation, that inquiry and search was made in Mobile, it having been previously alledged, that the bill was directed to Charles Byram, Esq. Mobile.

Error to the Circuit Court of Pickens. Before the Hon. S. Chapman.

Assumpsit, by the plaintiff in error, as indorsee of a bill of exchange, drawn by the defendant in error, (and one Wightman,) indorsed to the plaintiff by Reese & Heylin, and accepted by Charles Byram. In the declaration, the bill is described as their second of exchange, (first of the same tenor and date unpaid;) and that the bill was directed to Charles Byram, Esq. at Mobile, and by him accepted.

The dishonor and protest of the bill are thus stated: "When said bill became due and payable, to wit, at, &c. Sidney J. Douglass, notary public, at the request of the said plaintiff, with said bill in hand, did make diligent search and inquiry for the said acceptor, said Charles Byram, Esq. in order to demand payment of said bill, but could not find him, or find any one authorized to pay said bill, said notary public did, at the request of the said plaintiff, then and there protest," &c.

There is no allegation in reference to the *first* of the set.

The defendant demurred to the declaration, which was sustained by the court, and judgment final rendered for the defendant.

This is now assigned as error.

Peck, for plaintiff in error, cited 1 Saunders on P. & E.

264-5; Downs & Co. v. Church, 13 Peters, 205; Taylor v. Branch, 1 S. & P. 250.

HUNTINGTON, contra.

1. The practice in pleading, whereby the first of exchange only is noticed, when action is brought upon it, does not apply to cases when the action is brought upon the second; in these latter the first must be vouched in the declaration, or its absence (as by loss or otherwise) accounted for.

2. The declaration should have alledged that search was made for Byram, (the acceptor,) either in Mobile, or else in the last place of his residence.

COLLIER, C. J.—It is common, and the practice is of long standing, for the drawer to make and deliver to the payee several parts, usually designated a set of the same bills of exchange, each one of which states upon its face, that either part of the set being paid, the bill is to be considered discharged. A bill is thus drawn to avoid delays and inconveniences, which might otherwise arise from its loss or miscarriage, and also to enable the holder to transmit the same by different conveyances to the drawee, so as to insure the most prompt and speedy presentment for acceptance and payment. Chitty on Bills, 9 Am. ed. 175-6; Story on Bills, §§ 66, 67. The *bona fide* holder of any one of the set, if accepted, it is said may recover the amount from the acceptor, who would not be bound to accept any other of the set, which was held by another person, although he might be the first holder. So payment to the holder of one part, will be a complete discharge of the acceptor as to all the other parts. Id. 176; Id. § 226. If one of the parts has been accepted, the payment of another unaccepted part will not liberate the acceptor from liability to pay the holder of the accepted part, and such acceptor may therefore refuse to pay the bearer of the unaccepted part, and may compel him, if he suggests that he has lost the accepted part, to find sureties against his liability to pay the accepted part. See Wells v. Whitehead, 15 Wend. Rep. 527; Chit. on Bills, *supra*. And it would seem to have been held, that a person to whom any part of the set is first transferred, acquires a property in all the other parts,

and may maintain trover even against a *bona fide* holder, who subsequently, by transfer or otherwise, gets possession of another part of the set. Holdsworth v. Hunter, 10 Barnw. & C. Rep. 449; Perriera v. Jopp, Id. 450, note, a. It is said by Mr. Starkie, in his Treatise on the Law of Evidence, (2 vol. 228, 1 ed.) that in an action against the acceptor upon a bill drawn in sets, the different parts of the set must be produced; but the learned author cites no authority for the position. Chancellor Kent says, "If several parts, as is usual, of a bill of exchange, be drawn, they all contain a condition to be paid, provided the others remain unpaid, and they collectively amount to one bill, and a payment to the holder of either is good, and a payment of one of a set, is payment of the whole. The drawer or indorser to be charged on non-acceptance, or non-payment, is entitled to call for the protest, and the identical bill, or member of the set protested, before he is bound to pay; and it would be sufficient to produce it at the trial, or account for its absence. His rights attach to the bill that has been dishonored, and he is entitled to call for it. He may want it for his own indemnity, and without it he might be exposed to claims from some *bona fide* holder, or person who had paid it *supra protest* for his honor." 3 Kent's Com. 75-6, 1 ed.; Powell v. Roach, 6 Esp. R. 76; Kenworthy v. Hopkins, 1 Johns. Ca. 107; Durkin v. Cranston, 7 Johns. R. 442; Ingraham v. Gibbs, 2 Dal. Rep. 134. See Usher's Ex'r v. Gaither's Ex'rs, 2 H. & McHen. Rep. 457.

In Downes & Co. v. Church, 13 Pet. Rep. 205, it was decided, that where the holder of one of a set of exchange, which has been protested, and due notice thereof given to the indorser, brings an action thereon against the indorser, and upon the trial produces the bill to which the protest is attached, it is not incumbent upon him to produce or account for the non-production of the other parts of the set. That it is not necessary for each part of the set to be presented for acceptance before the right of action accrues. If one of the other parts has been accepted or paid; or presented at an earlier time and dishonored, and due notice not given thereof; or if some other person is the holder, and has given notice of his title to the party sued; these are matters of defence

which the indorser may establish. The law will not presume that the other bills of the set have been negotiated to other persons, merely because they are not produced. Nor can the indorser be prejudiced by their non-production; for if he pays the bill without notice of any superior adverse claim, under a negotiation of another of the set to a third person, he will be discharged from liability. See Posey and Coffee v. The Decatur Bank, 12 Ala. Rep. 802.

In the case at bar, it is inferable from the number declared on, that the bill was drawn in a set of two parts, and that each was a counterpart of the other, save that one was called the "first," and the other the "second of exchange." Each part requests the drawee to pay it, if the other is "unpaid," and is equivalent to a direction to pay it only in that event. The payment of one part then, according to the literal import of the paper, is a complete compliance with the request of the drawer, and if the drawee has not accepted the other part, he is under no obligation either to accept or pay it. If he is in any manner chargeable upon it, or to some other person than the plaintiff, it devolves upon him to prove it, as a ground of defence, and the holder need not negative by proof the existence of such a state of facts.

This argument is not inappropriate to the case of a drawer when sued for the default of the drawee. If he pays the accepted part without notice of the adverse claim of some third person, under another of the set, he cannot be charged a second time upon the latter. Here the holder of the accepted number is asking a judgment upon it. The payment of it, we have seen, would be proper, and operate a discharge of the liability indicated by the entire set; and the authorities cited are direct to establish, that if a demand of payment is properly shown or excused, then he is entitled to recover.

It is distinctly alledged, that on a specific day, which was the third day of grace, "at, &c., aforesaid," that is, at Mobile, where the bill was payable, the notary public, with bill in hand, did make diligent search and inquiry for the acceptor, and not being able to find either him, or any one who was authorized to pay the same for him, did, at the request of the holder, protest the same; of all which, afterwards, on

the same day, the drawers had notice. True it is not stated in *totidem verbis* that search and inquiry was made for the acceptor in Mobile, yet if it be necessary to particularize the place where search was made, we think this is sufficiently done by the terms "at, &c., aforesaid," which refer back to what precedes, and makes all sufficiently certain. Such is certainly the case where we do not recognize special demurrers. 1 Saund. Pl. & Ev. 264-5; Taylor v. Branch, 1 Stew. & P. Rep. 249; Kennon v. McRae, 7 Port. Rep. 175. This view answers the objections to the declaration—it follows, that the demurrer was improperly sustained. The judgment is therefore reversed, and the cause remanded.

MOCK v. KING, Garnishee.

1. If a plaintiff in attachment, after a garnishee has answered, disclosing the fact, that the demand sought to be condemned has been transferred, suffers several terms to elapse without taking the proper steps to bring the transferee into court, to contest with him the validity of the transfer, it is not error in the court to discharge the garnishee.
2. The undivided interest of one of several distributees of an estate, in the hands of an administrator *de bonis non*, &c., is not subject to the process of garnishment.

Error to the County Court of Lowndes. Before Hon. E. H. Cooke, County Judge.

In this case, the facts appear fully in the opinion of the court.

J. M. Hardy, for plaintiff in error.
T. H. Watts, contra.

CHILTON, J.—The plaintiff in eror having sued out an attachment before a justice of the peace, returnable to the

county court of Lowndes county, against the estate of Bowlin Smith, the sheriff indorsed thereupon "executed by summoning O. P. King, as garnishee, Dec'r. 1, 1846." At the December term, 1846, the garnishee filed his answer, and the cause was continued for further answer, and it was ordered, that notice issue to John Steel and P. T. Harris, commissioner in bankruptcy, to contest the validity of the transfer of the defendant's interest, as represented in the garnishee's answer.

At the fall term, 1848, to which the cause had been continued, the record recites, that the garnishee appeared, and having answered, that he held certain property in his hands as administrator *de bonis non cum testamento annexo* of the estate of Jeremiah Smith, deceased, which, by the provisions of the will, was to be equally divided among six heirs, when the youngest should attain the age of twenty-one years, (to which age the youngest heir had attained when the garnishment was executed upon the defendant in error.) That said estate consisted of land and slaves, besides other personal property, amounting in value to twenty thousand dollars, and which had never been divided. That said Bolin Smith was one of the heirs of said Jeremiah Smith. That said garnishee had seen on record in Autauga county, a transfer by said Bolin Smith to one John Steel, of his interest in said estate, and that he had heard both Smith and Steel say, said transfer had been made to secure Steel against liability for said Smith, as his surety upon his bond as executor of Jeremiah Smith's estate. That Smith informed the garnishee, if Steel lost nothing by his suretyship, the said property would be his, (Smith's.) The garnishee further answered, after notice, that he had seen from the records of the orphans' court of Autauga, an official statement by said Bolin Smith, as executor of J. Smith, by which a balance is certified in favor of said Bolin, of $2,351 99, by the judge of the orphans' court of Autauga county; whereupon the plaintiff asked for a judgment against the garnishee on his answer filed, which motion was overruled by the court. The plaintiff then prayed a continuance, and that notice issue to John Steel to contest his claim, which was also refused, and judgment was

entered discharging the garnishee, to revise which the cause is brought to this court.

1. It is certainly proper, in ordinary cases, when a garnishee answers to an indebtedness, but alledges notice of a transfer to a third person, for the court to continue the cause, and order a notice to issue to the transferee, that he may come in and contest with the plaintiff his right to the fund, &c. This is required by the statute. Clay's Dig. 63, § 40. But it is the duty of the plaintiff to proceed with proper diligence in bringing such transferee before the court. If he neglect to have such notice issued until the several terms after the answer of the garnishee, have elapsed, the court may, in the exercise of the discretion which is vested in the judge over the subject of continuances, refuse to grant a continuance of the cause, and may discharge the garnishee, if his answer does not warrant a judgment against him. In this case, the garnishee was summoned in December, 1846, and shortly thereafter answered. At the first term the cause was continued for further answer, and notice to issue to the transferee of the property in the hands of the garnishee. At the two succeeding terms no steps whatever were taken, but general continuances were entered, and at the fourth term the parties appear, and the plaintiff moved for judgment against the garnishee. Failing in his motion, he asked a continuance, and that notice issue to the same transferee for whom a previous notice had been awarded. We think the court very properly refused to keep the garnishee longer before it, as it was the duty of the plaintiff to have used proper diligence in the prosecution of the former proceeding ordered against Steel, the transferee.

It is very certain that the answer of the garnishee did not warrant a judgment against the defendant in error. Aside from the objection, that the interest which Boling Smith had in the property, had been conveyed to Steel, it appears that the garnishee holds the property as assets of the estate of Jeremiah Smith in his hands as administrator *de bonis non*, &c. That said property has not been distributed, but remains undivided, said Bolin being one of six heirs who are to share it under the will of Jeremiah Smith. The administrator denies his authority to hold the property from the law.

He is amenable to the orphans' court which appointed him, for the faithful performance of the duties imposed on him in virtue of his office. He must pay the debts of the deceased, and have the property forthcoming for distribution when he is required by law. If property thus held were liable to be seized and sold upon proceedings against those who may be entitled to distribution, much inconvenience and confusion would result, and embarrassment be experienced in the settlement of estates. Besides, no security would be afforded those creditors who might remain unpaid, as in the event the property is liable to be seized by attachment against the distributees, no refunding bond could be required. Other reasons might be urged why the property of the legatee, before distribution should not be subject to attachment at the suit of his creditor. A posterior will may be established—posthumous child born—the will which has been probated may be set aside perhaps—these and the like considerations have led my mind to the conclusion, that the administrator *de bonis non* with the will annexed, is not liable with respect to the unadministered assets of the estate in his hands, which may remain to be distributed to the creditors of the distributee by process of garnishment. See Brooks v. Cook & Barrett, 8 Mass. Rep. 246; Barnes v. Treat & Allen, 7 Mass. R. 271.

It results from what we have said, that there is no error, and the judgment is consequently affirmed.

PATTON v. ENGLAND.

1. Neither fraud nor failure of consideration is a good defence at law to a note given for the purchase money of land, when the vendee has accepted from the vendor a deed with covenant af warranty.

Error to the Circuit Court of Cherokee, before the Hon. G. D. Shortridge.

This was an action of assumpsit instituted by defendant against plaintiff in error, to recover the amount of six promissory notes, which had been given for the purchase money of a tract of land. The case went to the jury on the plea of the general issue, with leave to give in evidence any special matter in bar. The bill of exceptions discloses the following facts: During the negotiation preceding the purchase, the defendant pointed out to plaintiff the corner posts and lines of the land, and represented, although he knew such was not the truth, that the tract of land included a certain dwelling and outhouses, with a mill and water fall. On the conclusion of the purchase, the plaintiff executed the notes sued on, and the defendant a bond for titles, and immediately afterwards the plaintiff went into possession of the dwelling house, mills, &c., and has continued in possession ever since. The tract of land did not include those improvements, but they were on another lot of land, and the tract sold by defendant to plaintiff was almost valueless without them. Subsequently to the sale, and before the institution of the suit, the plaintiff accepted a deed, with covenant of warranty from defendant for the land embraced in the bond.

The court instructed the jury that if they believed all the evidence, they must find in favor of the plaintiff below for the full amount of the notes. To this charge the defendant below excepted, and now assigns it as error.

Walker and Rice, for plaintiff in error.

1. When there is a fraud in the sale of land, and by fraud the vendee is induced to give his notes, and to accept a bond and deed, and upon the discovery of the fraud, the vendee offers to rescind the contract, and the land mentioned in the bond and deed is worthless, and the vendee never had possession of it, but was in possession of other land which was falsely and fraudulently represented to be the land mentioned in the deed and bond, and the vendee promptly offers to abandon the possession of this, and to give up the bond and deed, the vendee may defend at law upon these facts, when sued upon the notes.

2. An offer to rescind, although not accepted, is in its ef-

fect upon the remedy, equivalent to a rescission. Clements v. Loggins, 2 Ala. 514.

3. The land conveyed being totally worthless, distinguishes this case from all others decided by this court, and renders a resort to chancery unnecessary. If the land conveyed had been of any value, then a resort to chancery might be necessary.

4. The vendee never had possession of the land conveyed, and the contract being rescinded by his offer to rescind, the vendor's deed will be rendered void, or it will give the vendor a right to call on the vendee for a re-conveyance.

5. The sale was effected by the grossest fraud on the part of plaintiff, who falsely represented the mills and other improvements to have been on the land conveyed, when he knew they were not. The land conveyed was absolutely worthless, and was never in the actual possession of the purchaser within a reasonable time, and as soon as he discovered the fraud, the purchaser offered to rescind. If in such case as this the purchaser cannot defend at law, there is no conceivable case where he can defend. In this case there was both fraud and a total failure of consideration. No verdict could have been properly authorized by the court, except for plaintiff's work and labor, and for the mill irons. Knight v. Turner's Ex'rs, 11 Ala. 639.

L. E. Parsons, contra.

1. The sole question in this case is, whether a vendee can defend an action for the purchase money, where he has accepted a deed and gone into, and still retains the possession of the property purchased—it being land and mills. Christian v. Scott, 1 Stew. 490; Clements v. Loggins, 1 Ala. 622; Dunn, use, &c. v. White, et al. Ib. 645; Duncan v. Jeter, 5 Ib. 604; Larkin v. Bank, 4 Porter, 434; Young v. Harris, 2 Ala. 108; Camp v. Camp, 2 Ib. 632; Starkie v. Hill, 6 Ib. 785; Knight v. Turner, 11 Ib. 636; 3 Ib. 406; 9 Ib. 776.

CHILTON, J.—This case comes substantially within the influence of several decisions of this court, and which we must regard as decisive of it. Although the mills and water fall, as well as the residence, are not on the land sold, as

they were falsely and fraudulently represeuted to be by the defendant in error, sttll the purchaser received the possession of them, aud derived some benefit under the contract, and has also accepted a deed with general warranty of title. The cases of Cullum v. Branch Bank of Mobile, 4 Ala. Rep. 21, and Stark et al. v. Hill, 6 Ib. 785, determine, that if the purchaser accept a deed with warranty, he cannot set up either fraud, or failure of consideration, at law, as a defence to an action by the vendor upon the notes given for the purchase money of land. With these decisions we are content. If the object be to rescind the contract, most certainly the court of equity is the most appropriate forum, as in that court alone can complete justice be done to all the parties. See cases on defendant's brief.

There is no error in the record, and the judgment is consequently affirmed.

THE GOVERNOR, USE, &c. v. GORDON.

1. A notary public, who receives his appointment and commission from the governor of the State, on the recommendation of the judge of the county court, is a public officer of the county.
2. Where a notary public fails to give to the indorser of a negotiable note the notice requisite to charge him, the statute of limitations of six years (Clay's Dig. 329, § 90,) commences to run, in favor of the sureties on his official bond, from the date of the default, and not from the time of its discovery, or the ascertainment of the damage, by the injured party.

Error to the Circuit Court of Mobile. Before the Hon. John Bragg.

THIS was an action of debt, instituted by the plaintiff against the defendant in error, as the surety of one Marsten, on a bond executed to the Governor of Alabama, for the faith-

ful discharge of his duties as a notary public. The writ was issued on the 2d November, 1846, and the case was submitted to the court below on the following agreed state of facts: On the 4th January, 1839, a promissory note for $741, made by Jeremiah Findley and John Gody, in favor of, and indorsed by Thomas G. Newbold and S. Andrews, negotiable and payable at the Bank of Mobile, was delivered by said bank to said Marsten, who was then a regularly appointed, qualified and commissioned notary public for the county of Mobile, for the purpose of demanding payment, giving notice of non-payment to the indorsers, and protesting: said notary protested the note for non-payment, and in his protest stated that he had only notified the indorser, Newbold, by leaving a notice at his office in Mobile: on the 14th April, 1840, the bank sued Newbold, and at the trial in 1841, was defeated in the suit, by Newbold setting up as a defence the failure of said notary to give him notice, and proving that on the 4th January, 1839, he had no office in Mobile: up to this time the bank did not know that the statement in the protest of said notary was untrue: in April, 1842, the bank sued said Marsten, and recovered a judgment against him: Newbold was the only solvent party on the note, and has been released from liability by the default of the notary: a demand was made of the defendant Gordon before this suit was instituted.

The principal defence relied on was the statute of limitations of six years, as applicable to the sureties on the bonds of public officers.

The court gave judgment for the defendant, from which the plaintiff in error appealed, and he now assigns said judgment as error.

Phillips, for appellant.

In cases of concurrent jurisdiction, courts of equity are governed by the statute of limitations—they do not decide in analogy to the law, but in obedience to it; the decisions in those courts, therefore, upon the statute, are authority in the courts of common law. Hovenden v. Ld. Amersley, 2 Scho. & Lef. 607, 630.

As applied to officers, the statute of limitations begins to

run from the time of their return, or when by law it was their duty to make a return. Betts v. Norris, 21 Maine, 324; West et al. v. Rice, 9 Metc. 568; Mather v. Greene, 17 Mass. 60. But in cases of fraud, the statute does not run until the discovery of it. Harrell v. Kelly, 2 McCord, 428; Rice v. White, 4 Leigh, 483; Mass. Turnpike v. Field, 3 Mass. 204; Sherwood v. Sutton, 5 Mason, 145; Raymond v. Simison, 4 Blackf. 84; Betts v. Norris, 21 Maine, 324; see dissenting opinion of Shipley, J.; 6 Bac. Ab. 386; Ballentyne on Lim. 96. So in cases when a demand was necessary, the statute would commence to run from the time of demand. Harriman v. Wilkins, 2 App. 93; Hutchens v. Gilman, 9 N. Hamp. 359.

And in case of a deposit in bank which suspended payment, the statute did not run until the depositor had knowledge of the suspension. Planters' Bank v. Farmers' Bank, 8 Gill & J. 458; Union Bank v. Planters' Bank, 9 Id. 439.

The same rule, as applied to officers, has also been applied by this court to attorneys, that the statute would run from the time of the liability incurred by not bringing suit to the first term. See Mardis v. Shackleford, 4 Ala. R. 493. But if the attorney should inform his client that he had brought suit to the first term, and the client trusts to the representation, would the attorney be permitted to plead the statute, to a suit brought against him for the damage resulting from his not suing to the first term?

In the case of the Bank of Mobile v. Huggins's adm'r, this court decided, that the one issued to give notice to the indorsers did not make the agent liable without a special damage had accrued. No action therefore accrued against the notary, until the indorser took advantage of his want of notice, and the other parties to the note were shown to be insolvent.

This is the case of a party not only not discovering the fraud in time, but prevented from the discovery by the act of the party.

The fact that the words of the statute do not contain the exception of fraud in its terms, is no stronger an argument as applicable to this statute, than to the general statute of limitations.

J. A. Campbell, contra. A notary public is an *officer* within the meaning of the statute entitled "an act to limit actions against securities of officers." Clay's Dig. 329, § 90. A notary public is appointed by public authority; his fees are regulated by statute, in the same class of officers, as those embraced in the statute above cited. Clay's Dig. 236. He gives a bond, and for his acts of misfeasance or malfeasance, he is liable on it "in like manner and with like effect," as sheriffs or coroners are on their bonds for the faithful performance of their duties. Clay's Dig. 379, § 7.

2. The plain language of the statute fixes the date of the liability of the sureties. The action must be commenced within six years "next after the commission of the act complained of." The statute does not designate the time of the discovery of the default, as that from which the time limited by the statute is to be computed. It presupposes that every default may be discovered within six years, and that an action may be commenced in that time. It terminates the liability of the sureties, after six years have expired from the default. The question then is, when did the default of the notary occur? The answer is, when he made his false return to the bank, that he had given notice. Since that time, he has exercised no control over the subject. Utica B'k v. Child, 6 Cowen, 238; Mardis, adm'r, v. Shackleford, 4 Ala. 495; Governor, use, &c. v. Stonum, 11 Id. 679.

CHILTON, J.—A notary public who receives his appointment and commission from the governor of the State, upon the recommendation of the judge of the county court, must be regarded as a public officer of the county. The statute requires him to enter into bond, with sufficient security, to be approved of by the judge of the county court, in the sum of $2,000, payable to the governor and his successors in office, for the faithful performance of the duties of his office. Clay's Dig. 379, § 7. By the first section of the act of 1832, (Clay's Dig. 329, § 90,) it is provided that "no action, suit or motion, shall be maintained against the surety or sureties of any sheriff, constable, or other public officer of this State, for any malfeasance, misfeasance, or other cause whatsoever, hereafter committed, unless the same be commenced or pre-

secuted within six years next after the commission of the act complained of; or if the claim be in favor of an infant, or person *non compos mentis*, or other person, disabled by law from bringing suit, then within three years after such disability to sue, shall cease to exist," &c. By the act of 1819, (Dig. 379, § 7) the bond of the notary is required to be recorded in the county where he resides, "and may be sued on by any party or parties injured, in like manner and with like effect, as bonds given by sheriffs and coroners, for the faithful execution of the duties of their respective offices." We think, from the language of these statutes, it is most manifest that a notary public is a public officer within the meaning of the first section of the act of 1832, and that his securities are not liable on his bond for his malfeasance, misfeasance, or other improper conduct, unless suit was commenced against them "within six years next after the commission of the act complained of."

It is insisted, however, by the counsel for the appellant, that the cause of action could not be said to have accrued until Newbold availed himself of the want of notice; as, until then, no injury had resulted to the bank from the failure of Marsten to give the required notice. And it is further insisted, that the circumstances make out a case of fraud against the notary, against which the statute of limitations does not begin to run until the fraud is discovered. It might be a sufficient answer to both these positions to say, the act complained of was the failure of the officer to give notice to Newbold, the indorser, and in certifying in the protest that such notice had been left at his office in Mobile, when in fact he had no office in the city. Since that time, the officer has done no act in regard to the note, for which his sureties can be held responsible. Now, is it permissible for the court, since the statute, in plain and unequivocal terms, fixes upon the date of the act complained of for the commencement of the limitation, to fix upon another and different period? It occurs to me we should by the construction contended for, virtually annul the statute. If the statute does not begin to run until Newbold availed himself of the want of notice, then the bank would have the right to prolong the liability of the surety to any period short of twelve years from the maturity

of the note. Or, if Newbold, when sued. chose to waive the statute of limitations, and to rely upon the defence of want of notice, then the sureties' liability would be prolonged to an indefinite period at the pleasure of the plaintiff. Such cannot be the correct construction of a statute evidently designed for the repose of the officer's sureties, and to rid them of responsibilities after the expiration of six years from the happening of the cause of complaint. The legislature very correctly concluded, that after the lapse of so many years, it would be difficult, if not impossible, in many cases, for the securities to find proof to explain the various acts of their principal, for which they might be sued, so as to exonerate themselves from liability. Besides, had the legislature intended to date the commencement of the statute of limitation from the discovery of the default, or from the time that the party ascertained such default would prove injurious to him, some such provision would doubtless have been inserted. But, although there is a saving as to infants, *non compotes*, and persons who are disabled by law from bringing suits, there is none as to the case made by the record before us. This, though not by any means conclusive, is at least persuasive to show, that the construction contended for is erroneous. A question having a strong analogy to the one before us, was decided by this court in The Governor, use, &c. v. Stonum, adm'r, 11 Ala. Rep. 679. In that case, a sheriff having several executions in his hands, collected the money, and returned the writs, and shortly afterwards died. In about nine years after the return, a demand was made of his administrator for the money. The question was, whether the statute which we have above copied, commenced running from the time of the demand. The court held it did not, and say, that it commenced in favor of the surety when his responsibility was conclusively ascertained. It is there said that any other construction of the statute would make it perfectly illusory, as the surety has no means of ascertaining whether the money has been paid over or not, and cannot therefore protect himself by insisting on a suit being brought, or by discharging it himself, and resorting to his principal. In Mardis, adm'r, v. Shackleford, 4 Ala. Rep. 506, it is said: "It may be regarded as settled law, that the statute began to

run from the time the intestate was chargeable with negligence; for then, the right of action accrued in favor of the plaintiff." Many cases might be cited to show that the statute begins to run from the time of the negligence, and not from the ascertainment of the injury. See Wilcox v. Plumer, 4 Peters's Rep. 172; West v. Rice, 9 Metc. Rep. 564; Betts v. Norris, 8 Shep. Rep. 314. In Kerns v. Schoonmaker, 4 Ham. 331, it was held, that the statute begins to run as soon as the injurious act complained of is perpetrated, although the actual injury is subsequent, and could not be known, or immediately operate. See also Miller v. Adams, 16 Mass. Rep. 456; 12 Id. 127; 17 Id. 60. In the President, &c. of the Bank of Utica v. Child, 6 Cow. Rep. 238, the precise point here involved came before the court, and it was ruled that the statute commenced running from the time the notary failed to give the notice required to fix the liability of the indorser, and this, although the injury was ascertained by suit and judgment within the period of six years. So that, leaving out of view the peculiar phraseology of our statute, we think the law is clear, that the general statute of limitations, if it were six years, would embrace the case at bar. That nominal damages could alone be received in some cases, is no objection to dating the statute from the time of the default. See Mardis's adm'r v. Shackleford, *supra*. The party who apprehends the damage must quicken his diligence to ascertain it, or rely upon his suit brought within the six years, to recover for the probable injury. 4 Cow. Rep. 245. No question as to the fraudulent concealment of the cause of action by the notary from the plaintiff arises in this case. There is no evidence of such fraud, and we are not to presume it, when the facts may consist with honesty of intention; *non constat*, but that the notary supposed he had given the notice by leaving it at Newbold's office. He may be liable for want of that diligence which the law requires of him in ascertaining the fact of the indorser's residence, and no question of fraud be involved. We therefore defer going into an examination of the many conflicting authorities upon the point, whether a fraudulent concealment would avoid the statute until a case should arise necessarily involving it. See Smith v. Bishop, 9 Verm. Rep. 110; Allen

v. Mille, 17 Wend. Rep. 202; Fee v. Fee, 10 Ohio Rep. 469; Troup v. Smith's ex'rs, 20 Johns. Rep. 33; Ib. 277; Abell v. Harris, 1 Gill & Johns. Rep. 367; Baines v. Williams, 3 Iredell's Rep. 481; Martin & Yerg. Rep. 361; Miles v. Berry, 1 Hill's (So. Ca.) Rep. 296; *contra*, Doug. 664; 5 Mason's Cir. Ct. Rep. 449; 3 B. & A. 436; 3 B. & Bing. 73; 3 Don. & R. 330.

We think it is clear, that the plaintiff having failed to prosecute the security upon the bond for more than six years from the commission of the notary's default, the statute exempts the surety from liability, and that the court below properly gave judgment for the defendant.

The judgment is affirmed.

STEPHENS ET AL. v. NORRIS, STODDER & CO.

1. The circuit court has no power to direct an amendment of a judgment *nunc pro tunc*, after such judgment has been affirmed on certificate in the supreme court; and a writ of error will lie to this court, upon the judgment of the court ordering such amendment.
2. An amendment of an error in the original judgment, cannot be made in the supreme court.

Error to the Circuit Court of Lowndes. Before the Hon. E. Pickens.

Cook, for the plaintiff in error.

W. Hunter, for defendant in error.

1. The circuit court had jurisdiction—although its judgment was merged in that of the supreme court, as is decided in Wiswall v. Munroe, 4 Ala. 19. Yet it did not lose all power to correct its own entries. This was an affirmance on certificate, and consequently this court has no record to amend by; and from the necessity of the case, the circuit

court in which the record remains, must make the amendment. Besides, the statute says the clerk shall calculate the judgment from the note. This cannot be done here. How can this court know but that there are payments indorsed. See Clay's Dig. 325, § 70.

2. But if the court had no jurisdiction, and the proceeding was *coram non judice*, no writ of error will lie on its void order; and nothing can be done but dismiss the writ of error, according to the decisions of this court.

But if the court should hold the circuit court had no jurisdtction, and its orders of amendment are void, then this court is moved on the petitions and records herewith submitted, to make the proper order for the amendment *nunc pro tunc.*

CHILTON, J.—The question is, whether the circuit court had the power to allow an amendment of its previous judgment, *nunc pro tunc*, after such judgment had been affirmed upon certificate in the supreme court.

In Wiswall v. Monroe, 4 Ala. Rep. 19, it was held, that that when the judgment of the inferior court was superseded by a writ of error bond, and was affirmed by this court, the effect of such affirmance was, to merge the judgment of the inferior, in that of the supreme court; and that an execution issued on the judgment of the inferior court, after its affirmance, would be quashed. We are satisfied with this construction of the act of 1826, and it follows, that as the judgment of the circuit court was merged, sunk, by the judgment of this court that no amendment could properly have been made. We have been unable to find any authority which will sustain the judgment *nunc pro tunc*, and we think upon principle, it is indefensible. We do not agree however with the counsel for the defendants in error, that it is so utterly void that no writ of error will lie. The court has jurisdiction over the subject of amendments, but has, as we conceive, erroneously exercised it in rendering a judgment against the plaintiffs in error. The judgment must therefore be reversed.

A petition is filed in this court with the record, praying that if the court should deem the correction of the judgment in the circuit court irregular, that the correction may be

made in this court. This court doubtless has the power to correct its own judgments *nunc pro tunc*, so as to make them conform to the truth of the case, but there must be something to amend by. Here the judgment was affirmed on certificate—no record was filed, and the judgment rendered by this court is in conformity with the certificate upon which it is predicated. To receive the proof at this time, that an error existed in the judgment of the circuit court, which was amendable in that court, and which should have been amended before the affirmance in this, and to grant the relief prayed by the petition, would clearly involve the exercise of original, not appellate jurisdiction. It has been the uniform practice of this court to deny similar motions.

EVANS v. THE BANK OF THE STATE EL AL.

1. A sheriff, or his sureties, proceeded against under the act of 1826, may insist on the fact of the receipt of the money being found by a jury; but if they appear, and make no objection, they will be considered as having waived it.
2. When the judgment entry recites, that proof was made, that the party proceeded against, was surety of the sheriff when the money was collected, and received by him, this court will intend, that it was proved by the production of the sheriff's bond, on which he was surety, and that that relation continued to exist, so as to embrace the period of default.
3. The plaintiff is not confined to the proof of the demand, at the time stated in the notice. Proof of demand at any time after the receipt of the money by the sheriff, and before the motion, will be sufficient.

Error to the County Court of Tuscaloosa.

The facts sufficiently appear in the opinion.

E. W. Peck, for the plaintiff in error.

P. & J. L. Martin, for defendant.

CHILTON, J.—This was a motion at the instance of the bank against David Chandler, late sheriff of Perry county, and his securities in office, for failing to pay over, upon demand, the sum of $540, alledged to have been collected by him under, and by virtue of an execution in favor of said bank, against one Davis. Notice of the motion having been served alone upon the plaintiff in error, a judgment was rendered by the court, at the term indicated by the notice, against him, without the intervention of a jury.

It is insisted in this court that the county court erred in rendering judgment without the finding of a jury. 2. That the facts set forth in the judgment entry, do not warrant the judgment, and that the court erred in rendering judgment upon them.

The judgment entry recites, that the parties came by their attorneys, and the said bank moved for judgment against said Evans, as one of the sureties of said Chandler, for the failure of the latter, as sheriff of Perry county, to pay over certain monies collected by him, on an execution described in the notice, &c. And it appearing to the satisfaction of the court, that the execution in favor of the President and Directors, against Hugh Davis, in the said notice mentioned and described, was properly issued on a judgment of this court, and that it came duly to the hands of the said David Chandler, as sheriff of the county of Perry, before the return day thereof; and it further appearing to the satisfaction of the court, that the said Chandler as sheriff, as aforesaid, collected and received, upon said execution, the sum of $540; and it further appearing, that a demand of the monies aforesaid was made of the said David Chandler, on the 31st day of July, 1846, by William Hawn, cashier of said bank, and agent for the said plaintiff, and acting for them in that behalf, in Perry county, and that the payment of said monies was then refused by said Chandler; and it further appearing, that the said James G. Evans was security of the said Chandler, as sheriff aforesaid, at the time the monies aforesaid were collected and received by said Chandler; and it also appearing, that said Evans has had more than three

days notice of this motion, by notice duly executed and served upon him him on the 28th day of November, 1846, and the said Evans saying nothing in bar or preclusion, it is therefore concluded by the court, that the plaintiff recover of said Evans the sum of $540, the amount collected as aforesaid, and not paid over; also, that he recover the further sum of $454 50, as damages, being five per cent. per month, on the amount of the execution, for sixteen months and twenty-six days, that being the number of months and days which have elapsed since the demand and refusal aforesaid, up to this date, besides the costs in this behalf expended.

The general rule certainly requires, the record should show affirmatively every fact necessary to sustain a summary judgment, rendered in virtue of particular jurisdiction conferred upon the court. Lyon v. Bank, 1 Stew. Rep. 442; Curry v. The Bank of Mobile, 8 Por. Rep. 360; Allums v. Hawly, 8 Ala. Rep. 584. In support of the objection, that the court should have empannelled a jury to try the fact, whether the money had been collected, we are referred by the counsel, to Mason & Daniel v. Brashier, 1 Ala. Rep. 635. That case decides, that in a proceeding under the act of 1822, against the sheriff for failing to pay over money collected by him, (and which requires an issue to be made up and tried by a jury, unless the receipt of the money appear of record, or by some paper filed in the clerk's office,) the summary judgment cannot be sustained without the verdict of a jury, unless the record shows the receipt of the money, was proved by matter of record, in the court below, or some paper filed in the clerk's office.

The act of 1826 makes no such requisition, but provides, "that whenever any clerk, sheriff, or coroner, shall fail, or refuse to pay over any money received, or collected by him, upon any execution, on the application of the plaintiff, or plaintiffs, his, her, or their attorney, or agent, it shall be lawful for the court, to which such execution shall be made returnable, upon one day's notice being given to said clerk, sheriff, or coroner, on motion of the plaintiff or plaintiffs in execution, to render judgment against the clerk, sheriff, or coroner so failing, or any, or either of them, for the amount of money thus received, together with five per cent upon the

amount of said execution, as damages, for each and every month for which the said money shall have been detained, after demand made, together with costs of suit. Clay's Dig. 218. It was said in the case of Mason & Daniel v. Brazier, *supra*, that this act might be considered as superseding all other acts upon the subject, did it not require one day's notice to the *clerk*, *sheriff*, or *coroner*. In that case the sheriff had not been notified, and the court for that reason say, the judgment could not be supported under the act, having previously decided, in Orr v. Duval, 1 Ala. Rep. 262, that under the act of 1826, the sheriff was a necessary party. The act of 1841, remedies the defect in the act of 1826, and authorizes a judgment against "such of the parties as service is effected on." See Williamson and Daniel v. The Branch Bank at Montgomery, 3 Ala. Rep. 504; Clay's Dig. 536, § 14. The act of 1826, as we have seen, does not require the fact of the receipt of the money to be found by a jury. The court was not bound *mero motu* to submit such issue to a jury, and conceding that the defendant might insist on a jury trial, there can be no doubt of his right to waive it. The record in this case shows he was present by his attorney, and said nothing in bar or preclusion of the motion for judgment against him. We conclude therefore, there was no error in the rendition of judgment by the court, without the finding of a jury.

We think the objection, that it does not appear the defendant below was security for Chandler when the default was was made, cannot be sustained. The notice, which is referred to in the judgment entry, describes the said defendant, as being one of the securities of Chandler. He appears and makes no defence, and the judgment entry recites that proof was made of his being security when the money was collected, and received by the sheriff. We must intend that this fact was proved by the *legal* evidence, the production of the official bond of Chandler, on which Evans was bound as surety. This fact being made affirmatively to appear, by the production, &c. of the official bond of the sheriff, we must intend, in the absence of all other proof, that the relation continued to exist, so as to embrace the period of default. The bank made out a *prima facie* case against the

surety, and devolved upon him the necessity of showing he had been discharged, if such were the fact, when the default occurred. The continuance of the security's liability, the fact having been shown to exist, and there being no countervailing proof, is a presumption of law arising upon the record, and which the judgment entry need not recite. As well might the rule require the judgment entry to negative any other matter of defence—for example, that the security was not an infant when he signed the bond—was not forced to sign it, &c., as, that he has never been discharged from it. These are matters of defence, the *onus* of proof of which is on the defendant. In the Branch Bank of Mobile v. Broughton, 10 Ala. Rep. 148, it is said "if the sureties appear, and do not put the fact of their suretyship in issue, it is an admission that they are properly charged as such."

The judgment entry distinctly avers, that the money was demanded on the 31*st July*, 1846, and although it may be that this is a clerical misprision, we are not authorized by the record so to regard it. The notice avers that the demand was made one year previous to the time stated in the judgment entry, but the plaintiff was not confined to proof of demand *at the time* stated in the notice. It was sufficient to show such demand, after the receipt of the money by the sheriff, and before the motion. Spence et al. v. Rutledge, adm'r, 11 Ala. Rep. 557.

Let the judgment as to the damages be corrected, and entered for the proper amount, at the cost of the plaintiff in error.

ANDREWS, Adm'r, v. HALL et al.

1. A decree of an orphans' court, which ascertains the interest of the several distributees of an estate, and directs their respestive distributive shares

to be set apart by commissioners, is such a final decree, as will authorize the revision of it on error.

2. When in the distribution of an estate in the orphans' court, it is made to appear, that an infant has been advanced, but not to the full amount of what would be its distributive share, the guardian *ad litem* of the infant, with the concurrence of the court, has the power to elect, and to bring such advancement into hotchpot.

3. When advancements have been made to distributees of an estate, in the life time of the decedent, and, on distribution such advacements are brought into hotchpot, the distributive share of the widow is not increased thereby, but must be carved *alone* out of the estate, of which the decedent died possessed, without reference to the advancements.

4. The widow of a decedent is a competent witness in a controversy, involving the amount of advancements for which each of the several distributees is accountable.

Error to the Orphans' Court of Dallas. Before the Hon. A. S. Saffold, Judge.

This case arose out of a petition filed by Warren B. Andrews, administrator on the estate of Richard Hall, deceased, setting forth that he had in his hands, as the property of said estate, a number of slaves which were not needed for the payment of debts, and praying a division of them among the distributees. A guardian *ad litem* was appointed for William A. Hall, an infant distributee. When the case came on to be heard, it was made to appear to the court, that all the distributees, except Sarah Hall, the widow of the deceased, had, in the lifetime of the said Richard Hall, either by themselves or through those to whose distributive shares they had succeeded by right of representation, received advancements, but that the advancement for which the infant distributee was accountable, was less in amount than the distributive share which he would be entitled to after such advancement was brought into hotchpot. The guardian *ad litem* thereupon, under direction of the court, elected, on behalf of said infant distributee, to bring his advancement into hotchpot, and the other distributees who had been advanced, made the same election for themselves. The court having ascertained by evidence the advancement made to each distributee, proceeded to make the division, and decreed, among other things, that the widow of the deceased should, in the first place, re-

ceive one-fifth of the slaves, and *then* to the value of one-fifth of the aggregate amount of the advancements out of the remainder of them. In ascertaining the several advancements, Sarah Hall, the widow of the deceased, was admitted by the court as a witness.

The plaintiff now assigns as error—

1. That the court permitted the gnardian *ad litem* to make the election for the infant distributee.

2. The decree made in favor of Sarah Hall.

3. The admission of Sarah Hall as a witness.

And the defendants in error move at the same time to dismiss the writ of error.

Wm. Hunter, for plaintiff in error.

1. The question of fact is, did not the orphans' court fix a lower value on William A. Hall's share than the evidence warranted? There were but three witnesses, and two of them set a much higher value—and these two witnesses do not give mere opinions, they state facts which show the real value, independent of their opinions—and they prove also, what was the estimate of William A. Hall himself. Mrs. Hall, the other witness, was incompetent, and she says she does not know what was the market value of slaves.

2. The question of law is, whether the widow is entitled to a distributive share of property brought into hotchpot. These authorities are referred to, as showing that she is not so entitled. Clay's Dig. 197, § 25, 26; 2 Wms. on Ex'rs, 919; Kircudbright v. Kircudbright, 8 Ves. 51; Stearns v. Stearns, 1 P. M. R. 157; Porter v. Collins, 7 Conn. 1; Lawton's case, 3 Dess. 199; Logan v. Logan, 13 Ala. 163.

3. As to the objection that this is not a final decree. 1. Both an appeal and a writ are taken. 2. But a writ of error would lie. Harrison, *ex parte*, 7 Ala. 736.

Evans, contra.

1. The administrator cannot complain, that the infant, Richard Hall, son of W. A. Hall, was allowed, under the circumstances, to bring into hotchpot the advancement received by his father in his lifetime. The child, in this case, before he can be admitted to his father's distributive share,

must bring the advancement of the father into hotchpot. 2 Wms. on Ex'rs, 919. In this case, if no one can elect for the infant, he will be utterly without remedy. The election cannot prejudice the infant. He is not required to bring back the identical property, but to have his share diminished to the extent of the value of the advancement.

2. There could be no error in permitting Sarah Hall, the widow, to testify. If she had no interest in the advancement to be brought into hotchpot, she stood entirely indifferent. It was a contest among her children, by which she could be neither benefitted nor prejudiced. Besides, she gave testimony only as to the value of one advancement, (that in which the infant, Richard, was concerned,) and this testimony was to reduce the value of the advancement, and was so against her interest, if she had any.

3. If the question arising under the 4th assignment of errors, has been concluded by the recent decision of this court, (in manuscript,) it is not proposed to cite authorities or offer argument on that point. But we insist that this is not such a final order or decree as a writ of error may be sued out on. It is a mere direction to commissioners, the principle of which may, or may not be acted on, or confirmed, on the final order of division in the cause. The question will properly arise on exceptions to the report of the commissioners.

5. The application is made by the administrator—all the orders are made at his instance, and he cannot now alledge any error in these orders, except for causes shown by a bill of exceptions.

CHILTON, J.—1. The decree in this cause made by the orphans' court, which ascertains the interest of the several distributees, and requires their respective shares to be set apart by commissioners, must be regarded as final, so as to authorize its revision on error. Such was the decision by this court in Harrison et al. *ex parte*, 7 Ala. Rep. 736; see also, Weatherford v. James, 2 Ala. 170; McKinley v. Irvine, 13 Ib. 681. The motion to dismiss the writ of error, is therefore overruled.

2. The statute requires, that when any of the children of a person dying intestate, shall have received from such intes-

tate, in his lifetime, any real or personal estate by way of advancement, and shall choose to come into the partition of the estate, such advancement, both of the real and personal estate, or the value thereof, shall be brought into hotchpot with the whole estate, real and personal, descended; and such party bringing into hotchpot such advancement as aforesaid, shall thereupon be entitled to his, her, or their share of the whole estate so descended, both real and personal. Clay's Dig. 197, § 25. In this case, Richard Hall, the grandson of the intestate, and who is entitled to the distributive share of his deceased father, William A. Hall, is an infant, under the age of twenty-one years, and the question is presented, can the guardian *ad litem*, or the orphans' court judge, or both, elect for him to bring into the estate, the value of the property received as an advancement by his deceased father, from the intestate. This question has never before come before this court, and is one not entirely free from difficulty.

There can be no question but that the law requires the child whose deceased parent has been advanced in his lifetime, to bring into hotchpot the share or its value which has been so advanced, before he is allowed to participate in the distribution of the intestate's estate, since, as the representative of his father, he could have no better claim than he would have had, if living. See 2 Williams on Ex'rs, 919; Proud v. Turner, 2 P. Wms. 560.

The statute confers upon the county court judges, "authority, within their respective jurisdictions, from time to time, to take cognizance of all matters concerning orphans and their estates." Dig. 302, § 28. The power is given to settle estates, and to require the children advanced to bring into the estate the sums advanced to them, &c. If the share to which the infant would be entitled, upon bringing the advance to his parent into hotchpot would exceed the value of the advance, then, being for the *interest* of the infant to take a distributive share, the power is lodged somewhere, as he cannot elect himself, to make the election for him. In England, the king as *pater patriae*, has the care of infants, and the court of chancery, to which that care is delegated, has a general control over them and their interests, whenever they

become wards of the court. Bertie v. Lord Falkland, 2 Vern. 333; 2 P. Wms. 119; 1 Mad. Ch. 331. In our country, the same authority is vested in the equity courts, having adopted the English rules of procedure so far as consistent with the genius of our institutions; in this State, however, it is manifest the legislature intended to confer upon the county court judges an enlarged jurisdiction over orphans and their estates, from the general language in which the act above copied is couched. And we think the orphans' court has power, concurrently with the court of equity, to direct an election in cases like the present, for the benefit of the infant. No good could result from driving the parties to a court of equity, and much delay and expense will be avoided by the exercise of the jurisdiction by the orphans' court; besides, such power seems to be inseparably connected with the proper discharge of the duties devolved by the statutes upon that court. See Gregg et al. v. Bethea, 6 Porter 9. There may cases arise where the jurisdiction of the orphans' court is inadequate to furnish relief, and the party must resort to a court of equity, but this is not one of them. It is an error to suppose that the office of a guardian *ad litem* is a mere sinecure. It often happens that he should seriously contest the plaintiff's claim. His duty requires him to acquaint himself with the rights, both legal and equitable of his ward, and to take all necessary steps to defend and protect them. If, in consequence of his culpable omission or neglect, the interests of the infant are sacrificed, he may be punished for his neglect, as well as made to respond to the infant for the damage sustained. Knickerbacker v. De Friest et al. 2 Paige, 304. It was the duty of the guardian *ad litem* in this case, to present to the court the right of his ward to contribution, and the circumstances and conditions connected with it, so that the court could protect him by making the election which was essential to his interest. This was done in the court below, and the action of the court is free from error.

3. The orphans' court however erred in permitting the widow to share in the estate brought into hotchpot. She is is not entitled to any share in advancements made by her husband to his children, unless real estate be advanced, in

which she may claim dower. This point was expressly decided by this court in Logan v. Logan, at the last term, and we need not further notice it here. It follows, that as the widow could not participate in the advancements made to the children, she had no interest which could be affected by her testimony, and was a competent witness as between the administrator and distributees to prove the value of the advancements.

We should be inclined, from the proof set out in the record, to place a higher estimate upon the slaves advanced to Wm. A. Hall, than was affixed by the judge below, but as the case must go back, and additional proof may be taken, an opinion upon this point in the cause becomes unnecessary.

Let the judgment be reversed and the cause remanded.

HUNLEY ET AL. V. HUNLEY.

1. One person being the executrix of R. H. and the administratrix of Richard H. his son, the latter estate being indebted to the former, a bill is not multifarious, which makes her a party, and unites a claim against both estates, although a claim is also asserted against her as due from Richard H. to R. H. She was a necessary party to protect the interest of the former.
2. The objection cannot be taken for the first time at the hearing, that one was improperly made a defendant, he having answered fully, tendering issues both of law and fact. No decree having been rendered against him, his having been a party, cannot affect the decree made against another defendant.
3. A court of chancery has jurisdiction to entertain a bill for a discovery of assets, which an administratrix has not returned in her inventory.
4. Where a father went to live with his only son, who afterwards worked their slaves on the plantation of the son in consideration of which the son supported the father, after the death of the father, the son should be charged with the reasonable hire of the slaves, if he kept and employed them.
5. The declarations of a grandfather, that he had given certain slaves to the

children of his son, will not constitute a valid gift, in the absence of proof of an actual delivery, the slaves being found in his possession, at his death. The fact that the slaves were under the control of the father of the children will not vary the case, there being no proof that they were delivered to him for the purpose of consummating the gift.

6. Admissions, or declarations, will not operate an estoppel against the party making them, unless he derives some advantage, or gains some object thereby, or the opposite party is induced to act upon it, or sustains some injury in consequence of trusting to its truth.

Error to the 12th Chancery District. The cause was tried before the Hon. Chancellor Lesesne.

The facts will appear in the opinion.

Geo. Gayle, for the plaintiff in error made the following points:

I. The bill should have been dismissed as to Richard Hunley; his answer showing he had no interest, and he being improperly joined. Toulmin v. Hamilton, 7 Ala. 362; Cherry et al. v. Belcher, 5 S. & P. 133.

II. 1. Under the demurrer the bill should have been dismissed for want of jurisdiction; the orphans' court having previously taken jurisdiction for a final settlement, &c. See Apperson v. Cottrell, 3 Porter, 51; Eaton v. Patterson et al. 2 S. & P. 9; Cherry & Bell v. Belcher, 5 Ib. 133; Dobbs v. Cockerham, 2 Porter, 328. 2. The case in 9 Ala. 391, seems to conflict with these cases, but there the administrator claimed the property under secret gifts. 3. The bill don't charge the orphans court inadequate to the relief asked; and does not show that Caroline M. Hunley, as administratrix, has ever refused to account, or is in any default.

III. The decree is erroneous in holding Caroline, as executrix of Ransom Hunley, her husband, to an account under the bill filed for any portion of the crop of 1843. 1. The bill is multifarious, and the chancellor splits and divides the multifariousness; overrules and sustains the demurrer for that cause, and leaves the question of multifariousness as though it had not been decided. I have only to show then, that the bill was multifarious to reverse the decree upon the decision on the demurrer. 2. The bill is multifarious—1.

Because Ransom and Richard, farming in co-partnership in the year 1843, it seeks to settle that co-partnership with the representative of the surviving partner, and to compel the representative of another person to account for a portion of his private property, Caroline being the administratrix of one, and the executrix of the other. 2. Because there should have been two bills filed; one to compel Caroline, as executrix of Ransom, the surviving partner in farming, to settle the partnership, and pay complainant her interest in Richard's estate, or interest in the partnership, she being his widow; the other against Caroline, if chancery had jurisdiction, as administratrix of Richard, to discover assets, and settle, &c. The bill is clearly multifarious. See Colburn et al. v. Broughton et al. 9 Ala. 351.

IV. The chancellor erred in decreeing that the eight negroes were not a gift to the children of Ransom G. Hunley. To constitute a good parol gift, there must be a delivery, or a change of dominion; and both of these are unnecessary under some circumstances, as where a father gives to an infant child. See Sewell v. Glidden, 1 Ala. 53; Sims v. Sims, 8 Porter, 440; same, 2 Ala. 117, Goldthwaite's opinion; Caldwell v. Wilson, 2 Spears, 76; McLuny v. Lockhart, 1 Bailey, 117; Blake v. Jones, 1 Bailey's Eq. 141; same, 2 Hill's Ch. 629; Sanderson v. Marks, 2 H. & Gill, 252; 2 U. S. Dig. 468, § 53.

I maintain that the facts show, that Ransom G. Hunley, the father of the children, had possession of all the property of Richard, his father, from 1838, up to Richard's death, in 1843, and supported and controlled them, and supported said Richard and his family; during which period Richard said he had given the negroes to the children.

Judge and Boling, for defendant in error.

1. As to the jurisdiction of the court, see Blakey, adm'r, et al. v. The Heirs of Blakey, 9 Ala. 391; Leavens v. Butler, 8 Porter, 399.

2. It is satisfactorily proved, that Richard Hunley remained in possession of the slaves until his death, exercising ownership over them. There appears, it is true, to have been an understanding in the families, that the slaves belonged to

the children of R. G. Hunley, who claim them, and declarations of Richard Hunley are proved, which might lead to such a conclusion; but these are not sufficient to divest his title. Blakey, adm'r, &c., *supra.*

3. Nothing is proved which in law would amount to a gift. Blakey, &c., *supra;* Sims v. Sims's adm'r, 2 Ala. 117, and authorities there cited. The paper upon which the names of the children of R. G. H. and the slaves were written, is not produced, or proved, and justify the inference that if produced, it would amount to nothing. If this paper was a deed, (but the proof shows it was not,) and exists, and is not produced, this fact weakens the force, and throws discredit upon the inferior testimony adduced of the same fact, if indeed it does not render it entirely valueless. Blakey, adm'r, &c., *supra.*

4. But independent of this consideration, there is no proof of a gift of the slaves. The declarations of Richard Hunley in relation to the gift, were contradictory at different times; nor does it appear that he ever parted with the possession, or the right to exercise control, or dominion over them, during his life, and there could not therefore be a valid gift of the slaves at common law. Blakey, adm'r, &c., *supra.*

5. It is evident that all that Richard and Lucy Hunley said about a gift of the slaves, was founded upon what took place when the names of the slaves and the children were written down. And all, or most that the witnesses prove, whose testimony is relied on to prove a gift, are such declarations of Richard and Lucy Hnnley. Then if the writing of the names down, was not a gift, no gift is proved.

CHILTON, J.—The bill in this cause was filed by the defendant in error, on the 8th May, 1846, and charges, that in 1843, Richard Hunley, the late husband of complainant, departed this life intestate, leaving complainant his widow, and Ransom G. Hunley his son, and only heir at law. That after the decease of his father, but in the same year, Ransom G. Hunley departed this life, having made and published his last will and testament in the county of Lowndes, by which he appointed Caroline M. Hunley executrix, said Caroline being his widow. That said will has been duly recorded,

and said Caroline has taken upon herself the execution thereof. That said Caroline was also appointed by the orphans' court of Lowndes, the administratrix of said Richard Hunley, deceased, and qualified as such. That the said Ransom, deceased, left five children, viz: Richard, Mary, Peter, Ann and Ransom, all of whom are infants, residing with their said mother, Caroline, and the two last are under the age of fourteen years. That no guardians have been appointed for either of said children, who represent their deceased father, and share with complainant in the estate of Richard Hunley, deceased. That said Richard died seized and possessed of a large estate, both real and personal, and if at all indebted, owed a very small amount. That Caroline, in January, 1844, returned an inventory of said estate to said orphans' court of Lowndes county, which is made an exhibit to the bill, but that in the inventory no mention is made of eight slaves, named in the bill, and charged to belong to said estate, and which did come, or should have come into the possession of said Caroline, as administratrix. That she has never accounted for said slaves in any way whatever.

The bill further charges, that in the year 1837, Richard removed from the State of South Carolina to Lowndes county, and settled on the premises of Ransom, his son, and they there commenced working their hands together in the business of planting, and continued there until the year 1843, when both of them died. That the crop of 1843, made by the labor of their hands, had not then been sold, nor the profits accruing upon it that year, divided; but was afterwards sold by said Caroline, and she has failed to account for the same, as will appear by her inventory, exhibited to the orphans' court. Complainant avers her ignorance of the quantity of produce raised on the farm in 1843, and prays a discovery of the proceeds, which have come into the hands of said administratrix.

The bill also alledges, that a partial distribution has been made of the estate of said Richard, and that it will be ready for final settlement as soon as Caroline returns the eight slaves, and the proceeds of the crop, as assets. That the debts due to and from the estate have been settled.

The complainant prays subpœna against the said widow

and children of Ransom Hunley, and seeks a discovery and an account of the eight slaves and crop of 1843, and that a settlement be had in the chancery court of the estate of said Richard Hunley, and final distribution made of the effects; also, that proceedings be enjoined in the orphans' court.

The answers deny that the eight slaves belong to the estate of the said Richard, but on the contrary, aver that they were given by him in February, 1838, to his four grand children, viz: Mary, Peter, Ann and Ransom, and were then delivered by him to Ransom G. Hunley for them, he being their father and natural guardian, and remained in his possession up to the time of his death. That said slaves have always, since the gift, been known and regarded as property belonging to said children.

As respects the profits of the farm for the year 1843, the answers aver that the parties lived together and cultivated the farm, under an agreement that the said Ransom should take charge of the slaves and stock, and carry on the business of farming on his premises, and that he should support and provide comfortably for the said Richard and his family—pay all expenses of carrying on the business, and provide said Richard, from time to time, such small sums of money as he might need or require, and the said Ransom G. Hunley was to have and receive the whole proceeds, above the expenses and outlays aforesaid, for his own proper use, and free from all account to any one. That the two families, stock, &c. belonging to both estates of Richard and Ransom, were supported on the produce of the crop of 1843, until crop time in the ensuing year, and nearly consumed the corn, fodder, &c. That one hundred and eight bales of cotton were raised, one hundred and three of which the administratrix has sold, as appears by returns of sales made by commission merchants, and attached to her answer. That in the making of the crop of 1843, Ransom worked about thirty hands, and Richard about twelve; and the said Caroline insists that if she is bound to account for the proceeds of the crop of 1843, she should only account for the proceeds of six hands, after allowing a deduction for their proportion of expenses incurred in carrying on the business, and a reasonable rent for the land. The answer further insists, that the amounts paid out

for Richard, since his death, by Caroline, coupled with the expenses incurred in the administration, will amount to as much as the distributive share of the complainant in the crop: avers also, a regular division was made of the estate of said Richard Hunley, early in the year 1844, and that the complainant received her share of the property. That nothing belonging to the estate of said Richard Hunley is now in her hands for distribution. The chancellor decreed an account to be taken of the crop of 1843, and that the eight slaves alledged to have been given to the children of Ransom, were the property of the estate of Richard, deceased. Several questions of law are raised upon the frame of the bill by demurrer, which we will consider before we come to the proof in the cause.

1. It is objected, that the bill is multifarious, and the chancellor was of this opinion, but permitted the complainant to elect to proceed against the defendant as administratrix of the estate of Richard Hunley, for the eight negroes, and the share of the crop, which she alledged belonged to said estate.

The defendant, Caroline, is the executrix of the estate of Ransom G., and the administratrix of Richard Hunley, deceased. The assets and funds of the estate of Ransom being in her hands, if that estate was indebted to the estate of Richard, the distributees of the latter estate, might well regard the debt as paid to her, and proceed against her as the administratrix of the intestate, Richard, for the amount due. She is presumed to retain out of the estate of her testator the amount of the debt, and this presumption obtains, whether the demand be liquidated or otherwise. Draughan v. French's adm'r, 4 Porter, 352; McLane v. Spence, adm'r, &c. 6 Ala. Rep. 894. Although the complainant could have obtained relief for any portion of the crop due from Ransom to Richard Hunley, without making the defendant a party *as executrix* of the former, still this does not render the bill multifarious. As the representative of Ransom, who was the only heir of Richard, it was proper that she should be brought before the court, that she might protect the interest of the estate.

The case does not come within the principle ruled in Col-

burn v. Broughton, 9 Ala. Rep. 351, where matters wholly distinct were united in the bill against the same defendants, and other persons were also made defendants, who had separate and distinct interests. It is more nearly analagous to the case of McCartney v. Calhoun et al. 11 Ala. Rep. 110, in which it was held that where one was administrator of two estates, a claim might be asserted in the same bill against both. See also Donaldson's ex'rs v. Pope & Posey, 13 Ala. Rep. 752.

If, however, the bill was multifarious, the court very properly permitted the complainant to elect, for which cause of complaint she would proceed. Marriat & Hardesty v. Givens, 8 Ala. Rep. 710.

2. There is no error in making Richard R. Hunley a party defendant to the bill. He claims a distributive share of the estate of his grandfather, Richard, and although he disclaims an interest in the eight slaves sought by the bill to be made assets of said estate, and insists upon the validity of the gift of them to his brothers and sisters, still, if the gift is set aside, the property would be distributed, and he would come in for his share. Besides, he does not merely file his disclaimer of all interest, and pray a discharge; but answers fully, tendering many issues of fact, as well as of law, and thus voluntarily undertakes to share the burthen of the litigation. No decree has been rendered against him, and his being a party cannot affect the propriety of the decree rendered against the administratrix. It is also well settled, that such objections come too late at the hearing. Erwin v. Ferguson, 5 Ala. Rep. 158; Story's Eq. Pl. 417, § 544; Newhouse et al. v. Miles et al. 9 Ala. Rep. 460; see also Heirs of Holman v. Bank of Norfolk, 12 Ala. Rep. 369, upon the subject of disclaimer.

3. Neither can the objection for want of jurisdiction be allowed to prevail. The eight slaves, and the portion of the crop sought to be recovered, had not been returned by the administratrix in her inventory. If this property really belonged to the estate of Richard Hunley, a discovery, and an account of the hire of the slaves and the proceeds of the crop, were necessary to a proper adjustment of the matter, and the limited jurisdiction of the orphans' court did not furnish ade-

quate relief. It was therefore permissible for the complainant to resort to the court of equity for this purpose, and that court, having obtained jurisdiction of the cause for one purpose, will proceed to dispose of the whole case. The cases of Leavens v. Butler, 8 Porter, 399, and Blakey's adm'r v. the heirs of Blakey, 9 Ala. Rep. 391, fully sustain the jurisdiction. See also Dement et al. v. Adm'rs of Boggess, 13 Ala. Rep. 140. The cases of Cherry & Bell v. Belcher, 5 S. & P. 9, and Dobbs v. Distributees of Cockerham, 2 Porter, 328, cited by the counsel for the plaintiff in error, do not militate against the view we have taken. In the case last cited, the court held that the truth of an inventory might be contested in the orphans' court, and a jury summoned to try the fact, but say further, "the most ordinary course appears to be, to proceed by suit on the administration bond, or by bill in chancery." 2 Por. 338.

4. Many witnesses have been examined upon the subject of the alledged gift of the slaves, and the interest which is claimed by complainant in the crop of 1843. We will briefly state the evidence, that it may be seen on which side it preponderates.

The first witness examined (Woodall) proves that in 1843 Richard G. Hunley told him, he and Ransom worked their hands together, but that all the proceeds were to go to Ransom, as all that he, the said Richard wanted, was enough to live on. That Ransom was his only son, and that after his (Richard's) death, all his property should go to Ransom. The same conversation is deposed to by the wife of witness, Mrs. Harriet Woodall.

Joshua Carroll was the overseer for Ransom Hunley during the years 1842–3, and in these years, heard Richard H. frequently say the slaves in controversy belonged to the the children of Ransom. That he had given to Richard R. Hunley, the eldest son of Ransom, two slaves in South Carolina by deed, which he had recorded, and that he had given since then two negroes to each of Ransom's other children. This witness further proves that the complainant below, Lucy Hunley, both before and since the death of her husband, pointed out the slaves in controversy as belonging to Ransom's children by gift from her husband, naming the slaves

which belonged to each. That Richard Hunley lived on the farm occupied and controlled by Ransom, and which belonged to the latter, who superintended the farming operations, and paid all the expenses incident thereto. That Richard told the witness in the years '42–3, that when he came to Alabama, he had given up all to said Ransom, and all he wanted was a comfortable support. That Ransom supported him. That Richard frequently designated the slaves which he had given to the children, being the eight slaves now in controversy, and said that he had not then, but intended to have the deed recorded, as he had previously had the deed of gift to the eldest son recorded in South Carolina. That the slaves were most generally about the house of Ransom G. Hunley, and fed in his yard, &c. Richard had five or six slaves, which were used as house servants—the remainder of the slaves on the place were put under this witness, as overseer in the name of Ransom. That after the death of Ransom and Richard, the witness continued in the employment of their respective widows, who had a division of the slaves; said Lucy, the complainant, putting under his control eight or ten hands, and Caroline, the defendant, about forty-eight.

The witness Lavenberg, proves that the children claimed their eight slaves in the presence of Richard and the complainant. That the complainant, in the presence of her husband, named the negroes which she and her husband had given to Ransom's children, being the slaves in controversy —two slaves to each of the children.

Wm. Miller overseed for Ransom in the years '39 and '40, and proves that Ransom controlled the hands and farm, and furnished provision for the hands, and incurred the expense of carrying on the farming operations; Richard residing on the place owned by Ransom, and having his dwelling house a few hundred yards from him. That the children of Ransom frequently claimed the slaves in controversy in the presence of Richard, between the years '38 and '43, and he made no objection to their claim.

The witness McDonald, proves that he has seen said slaves about the house of Ransom G. Hunley, and it was generally understood in both families, that they belonged to the children of Ransom, but thinks they were too young to be sepa-

rated from their mother, who belonged to Richard, and too small to work, and that they were more in the possession of Richard than of Ransom. This witness also heard Lucy Hunley, both before and since the death of her husband, speak of the slaves in controversy as having been given to the four youngest children of Ransom.

J. B. Stephens heard complainant say, a day or two before the death of Ransom G. Hunley, that her late husband, Richard, had given the slaves to the children of Ransom, and that she had nothing to do with them. She did not, however, specify the slaves. That this declaration was made by her upon being informed that she had been sent for by Ransom "to know something about the little negroes which his father (Richard) had given to his children."

Mrs. Wilson proves that Richard Hunley pointed out to her eight young negroes, then standing in his yard, saying he had given them to his four grand-children, Mary, Peter, Ann and Ransom, the children of Ransom R. Hunley—two apiece; but the witness does not know the slaves in controversy were those pointed out, except the girl Hester. That Richard Hunley always spoke of these negroes as belonging to said children.

Angus McKaskal overseed for Ransom in '41–2, and proves that the slaves of Richard and Ransom worked together on the place of the latter, and under his control. That Richard had some forty or fifty acres of land belonging to himself, but had nothing to do with the management or superintendence of the hands and farm. That the provisions for the slaves were furnished by Ransom.

Mrs. Jones was present at Ransom's house during his last illness, when he sent for the complainant; upon her arrival, she asked the witness why she was sent for, and was told that Ransom desired to know something about the children's negroes—whether she would object to the children having them. That the complainant, being very much agitated, replied, "Oh no! I wonder if Ransom does think I would wrong the children."

The witness McRee, boarded with Ransom from 1836 to the spring of 1840, with a slight intermission, and states that Richard repeatedly told him he had given the eight slaves to

the four children of Ransom. That he designated the slaves given to each, but the witness does not remember their names. He further states that the children claimed their respective slaves so given, and that it was well understood in both families the slaves belonged to them, and which of the slaves belonged to each. That Richard lived about a half mile from Ransom, and the houses occupied by the slaves of each were located between their dwellings, but the slaves were fed by, and were under the control of Ransom, except those immediately about the house of Richard, used as house servants, cook, &c.

Arabella McDonald, who was examined on the part of the complainant, states, that she was well acquainted with the parties. Has known the slaves in controversy from their birth, and that they were always in the possession of Richard, up to the time of his death, and were afterwards taken out of the possession of Lucy Hunley, by a servant woman, and placed in the possession of plaintiff in error. She further proves, that upon one occasion, when at the house of Ransom Hunley, he and his said father came into the room, the latter having a piece of paper laying upon a book in his hand, remarked to Lucy, his wife, that Ransom wished him to give each of his other children two negroes, to make them equal with his son Richard, to whom he had already given two, and requested her to name the little negroes, so that he might make the selection, and as their names were called, he wrote them down with a pen or pencil. Immediately thereafter, Ransom and his father both walked out; the witness heard Ransom say, "that would not do;" adding that he wanted him "to fix it," or "attend to it," the next time he went to Hayneville, and they went to the house of Richard, where the little negroes were. This witness deposes to after declarations of Richard, showing that he considered the gift as not perfect, for want of delivery, &c.

Mrs. Morrison proves, by the declarations of the plaintiff in error, how he obtained possession of the slaves, by sending her daughter and a negro woman, and bringing them to her residence, and then locking them up. This was in 1846.

The witness, *Gingles*, deposes to conversations had with

Richard shortly before his death, in which he stated that he had given, or intended to give his grand children two negroes each, but that he had changed his mind; that he had not made a title to them, &c.

We have thus, after a careful examination, extracted from the mass of depositions taken in the cause, the substance of the proof, and our minds cannot resist the conclusion, that Ransom, being the only son of Richard, took charge of the property of the latter, under an agreement to support him, and to provide for his family. No special agreement to this effect is proved, but the circumstances in evidence, coupled with the repeated declarations of the father, that all he wished, or expected, was a comfortable support, and that he intended his property for his son upon his death; and taken in connection with the further fact, that provisions were furnished the father, and monies paid for him, as is shown by the depositions of some of the witnesses, without any accounting, or charges being made, all very satisfactorily show, that the use of the slaves was considered as an equivalent for the maintenance of Richard and his family. It is very clear, from all the proof, that Ransom was to pay no specified price for the hands, nor was Richard to receive any specific compensation in the division of the crops. Their hands had worked in common for many years, and the comfortable support of the old gentleman and his family was all that he received, and was, according to his oft repeated declarations, all that he desired, or expected. The proof presents the case of an aged parent, who, with property sufficient for his support, yet desirous of freeing his mind from the cares and anxieties of life, sought an asylum in the family of his only son; delivering over his property to his control, trusting it may be to the promise of his son, or to his sense of filial duty and reciprocal obligation to protect the property thus committed to him, and for the comfortable support of himself and family. This idea accords with the proof, and harmonizes with the uniform conduct of the parties, which may be considered a just exponent of the understanding which obtained between them. We are therefore of opinion, that the chancellor erred in decreeing an account to be taken of the crop of 1843,

and in charging the plaintiff in error with any portion of the proceeds.

This arrangement however ceased upon the death of Richard, and if Ransom kept the property, and appropriated it to his own use after that period, he was bound for its reasonable hire, which may be decreed under the prayer for general relief.

In respect to the alledged gift of the eight slaves named in the bill, to the children of Ransom G. Hunley, it is most apparent from the proof, that an essential ingredient is wanting to consummate the gift, namely, the delivery of the property. It is true, Ransom may have had these young negroes, like the older ones, under his control, but this possession was not the possession of his children. *There is no evidence that they were ever delivered to him for any such purpose.* Indeed, there is not the slightest evidence of any delivery of these slaves, unless we are to infer such fact from the declarations of the donor, "that *he had given* the slaves to the children of Ransom." Such declarations cannot constitute a valid gift, in the absence of proof of actual delivery. Such was the decision of this court in Sewell, by his next friend, v. Glidden, 1 Ala. Rep. 52; and which has been followed by several subsequent decisions. See Sims, &c. v. Sims's Adm'r, 2 Ala. Rep. 117; Blakey, Adm'r, v. The Heirs of Blakey, 9 Ib. 391; Philips v. McGrew, 13 Ib. 255. That Richard Hunley, as well as his wife, the complainant, may at one time have supposed the gift to have been valid, is more than probable from their declarations, but whatever may have been their views respecting its validity, the donor retained the *locus penitentiae* until it was consummated either by the execution and delivery of a deed of gift, or the actual delivery of the slaves to the donees, or their guardian. It moreover satisfactorily appears, that the donor, before his decease, was apprised of the incomplete character of the gift, and the slaves are found in his possession at his death. Under all the circumstances of this case, and the proof which this record contains, we feel perfectly certain that no valid gift at common law was made of the slaves, and that the chancellor decided correctly, in decreeing they should be ac-

counted for as a portion of the assets of the estate of Richard Hunley, deceased.

The counsel for the plaintiff in error is mistaken in supposing the doctrine of estoppel can be applied to the declarations of Lucy Hunley, that her late husband had given the slaves, &c. To give such effect to the admission, the party making it must derive some advantage, or gain some object thereby. The opposite party must be induced to act upon it, or receive some injury in consequence of trusting to its truth. Such is not the case before us; it is very certain such declarations could not justify Caroline Hunley in seizing by force upon the slaves and taking them from Lucy Hunley's possession.

For the error, however, in decreeing an account for the crop of 1843, the decree must be reversed and the cause remanded.

GAREY ET ALS. v. EDWARDS & ALLEN, USE, &c.

1. Where a notice to a sheriff and his sureties, that a motion for judgment will be made against them, is found in the transcript, it will not be regarded as a part of the record unless it is made so by a bill of exceptions, or is identified in the judgment entry.
2. Where notice is given to a sheriff and his sureties that a motion for judgment will be made against them, the motion must be made at the term of the court, indicated in the notice, or some other proceeding be had to keep it alive, otherwise it will be considered as abandoned.
3. Where the judgment entry in a summary proceeding against a sheriff and his sureties, recites, that the defendants had notice of the motion, on a day *anterior* to the preceding term of the court, it will not be intended, to reverse the judgment, that the notice was of a motion designed to have been made at such preceding term, but which had not been made.
4. Where a suggestion against a sheriff and his sureties, for the failure of the sheriff to return an execution, after an accurate description of the

judgment and execution, states, that the plaintiff will "move and ask for a judgment against said defendant, for the amount of said debt, damages and cost, with legal damages for said default, and interest on said judgment to the trial thereof," it sufficiently indicated that the proceeding is instituted under the statute of 1819.

5. Where a suggestion against a sheriff and his sureties after describing the execution, avers the failure of such sheriff to "*execute*" and return it, and states, that the plaintiffs will move and ask for a judgment against the defendants for the amount of said debt, damages and cost "*with legal damages for said default*," the words, "*execute*," and, "*with legal damages for said default*," are surplusage, and will not vitiate the proceeding.
6. Where a suggestion is made against a sheriff and his sureties, for a failure of the sheriff to return an execution, the record of the judgment on which such execution issued, though found in the transcript, will not be regarded as a part of it, unless made so by some action of the primary court.
7. When on the trial of a suggestion against a sheriff and his sureties for the failure of the sheriff to return an execution, the defendants neglect to appear and plead, the measure of damages being fixed by the statute, there is no necessity for the intervention of a jury.
8. Where on the trial of a suggestion against a sheriff and his sureties for the failure of the sheriff to return an execution, a jury is impaneled and sworn to assess the damages as well for a failure to "*execute*," as for a failure to return the execution, and judgment is rendered on the verdict, such judgment is erroneous and cannot be sustained.

Error to the Circuit Court of Franklin. Before the Hon. D. Coleman.

This was a motion by defendants in error against Matthias E. Garey, sheriff of Sumter, and his securities, for the failure of said sheriff to return an execution in favor of said defendants, against James E. and Richard S. Jones. The record contains two notices—the first dated the 2d February, the second the 31st of March, 1842, both returnable to the spring term, 1842, of the circuit court of Franklin. The second notice was executed on the plaintiffs in error, on the 2d April, 1842. At the October term, 1842, the defendants in error filed a suggestion in said court, against said sheriff and his securities, which recites, that on the 20th May, 1840, an execution issued from said circuit court in favor of defendants in error, against James E. and Richard S. Jones, for $385 62, debt, $57 77, damages, and $14 cost of suit, on a

judgment rendered on the 15th April, 1840, which "execution duly came to the hands of said Matthias E. Garey, sheriff of Sumter county, for whom the other defendants were securities, in his official bond, and that said Garey, sheriff as aforesaid, failed to execute and return it according to law. Whereupon the plaintiffs move and ask for a judgment against said defendants for the amount of said debt, damages and cost, with legal damages for said default, and interest on said judgment to the trial thereof, and the costs of this suit." This motion was regularly continued at the October term, 1842, and for the six succeeding terms. At the spring term, 1846, judgment by default was rendered against the plaintiff's in error. The remaining facts of the case; with the several questions raised by the assignments of error, are fully set out in the opinion delivered by the court.

R. H. Smith, for plaintiffs in error.

Upon the coming in of the record under *certiorari*, the first assignment of errors is abandoned.

There was no notice of any motion to fall term, 1842. Upon the notice to spring term, 1842, no action was taken, either on the day or during the term indicated, and the notice had spent its force. Armstrong v. Robinson & Barnwell, 2 Ala. Rep. 164, and authorities of our court there cited.

The rule seems to have been intended as a rule for not returning the execution; and notice not only should have been given, but the act under which this proceeding was had should have been mentioned, or the notice should have been framed with so much particularity as necessarily to point to the act referred to. Hill v. The Bank, 5 Porter, 537; McRae v. Colclough, 2 Ala. 74. There was no appearance by Garey to cure the want of notice.

If the rule was for not making the money, notice should have been given. See act of 1841, Clay's Dig. 536, § 14, which in effect provides for notice. But without this statute, and although the act of 1826, Clay's Dig. 218, § 85, is silent as to notice of the suggestion, the law could not contemplate, nor could it constitutionally provide, that the sheriff of Sumter should be tried in Franklin without notice. The true mode of proceeding upon this statute is, it is con-

ceived, that upon the suggestion that the money could have been made, it is the business of the court to order reasonable notice to the sheriff. Kirkman v. Hawkins, 1 Porter, 25.

The judgment on which the rule was based, was rendered on 13th April, and the judgment on rule rendered for an alledged default in respect to a judgment rendered on 15th April. The record on the rule would not bar another recovery, and therefore the rule and the judgment on it are bad.

The death of Prince should have been shown to the court. Richard Prince, security for M. E. Garey, (and I know of no other,) is alive, and a party to the writ of error bond.

Neither the notice or motion indicate with sufficient clearness any particular default, nor for what default the rule was brought. This will readily appear by comparing it with the statutes.

The court, under the statute, should have caused an issue to be made up, and could not render judgment by default. The question for the jury was the question of default; it was the province of the court to see that notice had been given; the damages were fixed by law, and not for the jury to determine. Yet the jury were not sworn to try the only thing they could try—the default.

The finding of the jury should be a special finding of such facts as made out the liability, as our courts have often decided.

That the judgment is too large will appear by computation. Bondurant v. Lane, 9 Porter, 484.

The fact of suretyship was not for the jury, but for the court. Minor, 376; 2 Ala. 82.

Wm. Cooper, for the defendants.

CHILTON, J.—We cannot regard the notices of the intended motion sent up in this case as constituting any portion of the record. To make them such, they must be refered to in the judgment entry, so as to identify them as part of the record, or be presented by bill of exceptions. Lyon v. The State Bank, 1 Stew. R. 442; Curry v. The Bank of Mobile, 8 Porter, 372; Bates v. P. & M. Bank, Ib. 99; Armstrong v. Robertson & Barnwell, 2 Ala. 167.

Could we look to either of the notices sent up, it is perfectly clear, that as no motion for judgment was made at the term of the court indicated by the notices, they spent their force, and could not authorize the subsequent action of the court. Broughton v. The State Bank, 6 Porter's Rep. 48; Lyon v. The State Bank, 1 Stew. Rep. 442, 470; Armstrong v. Robertson & Barnwell, 2 Ala. Rep. 167.

The motion on which the judgment in this case is predicated was made at the October term, 1842, and regularly continued until the judgment was rendered. The entry recites, that the defendants had notice of the motion, on the 1st April, 1842. We are not allowed to intend that the notice here alluded to was of a motion to be made at a previous term, and which was not in fact made. This would be to indulge a presumption directly opposed to the recital of the entry, and that too for the purpose of reversing the judgment.

It is contended by the counsel for the plaintiff in error, that the suggestion does not, with sufficient certainty, inform the said plaintiff of the matters for which they are sought to be made liable. The suggestion describes the execution, the date of its issuance, and the amount; that it was issued on a judgment recovered in the circuit court of Franklin county, on the 15th of April, 1840, "and which execution duly came to the hands of Matthias E. Garey, the sheriff of Sumter county, and for whom the other defendants were his sureties on his official bond, and which execution the said Garey, sheriff as aforesaid, failed to execute and return according to law; wherefore the plaintiffs move, and ask for a judgment against said defendants, for the amount of said debt, damages and cost, with legal damages for said default, and interest on said judgment to the trial thereof, and the costs of this suit." There are two statutes giving the plaintiff a remedy against the sheriff for failing to return an execution. The act of 1807 authorizes the party injured, upon giving ten days notice, to move the court for a fine against such delinquent sheriff, not exceeding five dollars per month upon every hundred dollars contained in the judgment, &c. Clay's Dig. 217, § 80. The act of 1819 authorizes the party injured to move the court for judgment against the sheriff and his sureties, upon giving three days notice; which judgment, if the de-

fault is fixed upon the sheriff, is to be rendered for the amount of the execution. Minor's Rep. 376; 1 Stew. Rep. 63; 3 Stew. Rep. 134; 5 Porter's Rep. 545-6; Harris v. Bradford, 4 Ala. Rep. 214. The previons adjudications of this court require, that in proceeding against the sheriff for his failure to return an execution, the plaintiff must sufficiently indicate by his notice under which statute he seeks to recover, and that the want of particularity in this respect is fatal. In Hill v. The State Bank, 5 Porter's Rep. 537, the language of the notice was, "the plaintiff will move the court for judgment against you, according to the statute in such case made and provided." This was held insufficient, as it did not notify the defendant with sufficient precision as to what was demanded of him. In McRae et al. v. Colclough, 2 Ala. Rep. 74, it was held, that a notice informing the sheriff and his sureties that the plaintiff would move for judgment against them for the amount of the execution which was described, and which the sheriff failed to return, was a sufficient indication that the party was proceeding under the act of 1819. This last case is in point to show, that the notice in the case at bar, (and which we must intend corresponded with the grounds stated in the suggestion,) was sufficient. The motion is, for judgment for the amount of the execution, debt, damages and cost, with interest to the trial, *and the legal damages for the default.* Now the expression italicised cannot vitiate the notice. At most it is but surplusage, and the notice would be good without it. The same may be said with respect to the default—"the failure of the sheriff to *execute* and return the *fieri facias*"—the word execute is entirely superfluous, and falls within the familiar maxim, that "*utile per inutile non vitiatur.*" Thomas v. Roora, 7 Johns. 462; Com. Dig. tit. Pleader, c. 28; Evans v. Watrous, 2 Porter's Rep. 205. At most, the plaintiffs by such averment, that the sheriff failed to *execute*, as well as return the writ, takes upon him the burthen of proving such unnecessary averment to be true, and this the record shows he has done.

The objection by the plaintiffs' attorney, that there is a variance between the judgment described in the motion and judgment entry, and that on which the execution issued, in

this, that the motion and entry show the judgment was rendered on the 15th of April, whereas the record shows it was rendered on the 13th of that month, cannot be allowed to prevail. The record of the original judgment forms no part of this cause, and cannot be looked to for any purpose. The authorities cited as applicable to the notice, equally sustain this proposition. 1 Stew. 442; 8 Por. 372; Ib. 99; 2 Ala. Rep. 167.

There remains to consider the points raised upon the judgment entry. This entry shows the defendants below, being called, made default. That the defendants were served with notice on the 1st April, 1842. That Garey was sheriff of Sumter on the 8th August, 1840, and that the defendants were his sureties upon his official bond. That an execution issued 20th May, 1840, (describing it) "returnable according to law," being for $385 62 debt, $55 77 damages, and $14 costs of suit, which was adjudged on the 15th April, 1840, by the circuit court of Franklin, to said plaintiff, and was received by said Garey, as sheriff of said county of Sumter, on the 8th day of August, 1840. That the defendants in the *fi. fa.* had property sufficient out of which the sheriff could have made the money while the writ was in his hands; but that he failed to execute and return said *fi. fa.* according to law. These facts having been ascertained by the court, the entry proceeds: "It is therefore considered by the court, that the plaintiffs recover; but because it is unknown to the court what damages the plaintiffs have sustained by reason of the said M. E. Garey's failure to *execute and return said fi. fa. as the law directs;* thereupon came a jury, viz: Archibald Christian and eleven others, who being elected, impaneled and sworn, well and truly to assess the plaintiffs' damages, upon their oaths do say," &c. Here follows the same facts found by the court as above stated; and the jury conclude by assessing the plaintiffs' damages at $677 03. The court rendered judgment upon the verdict for the amount so found.

As the defendants failed to appear and plead, there was no issue made up for the decision of a jury, and there was certainly no necessity for submitting to them an inquiry of dam-

ages, since the statute fixes the amount of the plaintiff's recovery, for failing to return an execution by the sheriff.

But if it were permissible for a jury to pass upon the question of damages, the form in which the matter was submitted was improper. They were sworn to assess damages for the default of the sheriff in failing to *execute*, as well as for failing to *return* the writ. Now the statute in the one case gives the plaintiff a right to a judgment against the sheriff and his sureties for the amount of the *fi. fa.*, and in the other (failing to make the money) ten per cent. upon the amount is superadded. The record does not show but that the defendants below were prejudiced by this misdirection of the court.

For for this cause, the judgment must be reversed, and the cause remanded.

BRIGHT & LEDYARD v. YOUNG ET AL.

1. Where the plaintiffs in a cause, to whom a deed of mortgage had been executed, and which remained unsatisfied, in answer to interrogatories propounded to them under the statute, state, that the deed is in the hands of S P S, their attorney, and S P S being examined as a witness, deposed that it has not been in his possession for the last five or six months, and a notice to produce it on the trial, is shown to have been duly served on R S, another attorney, who had succeeded S P S in the management of the cause—these facts constitute a sufficient predicate for the admission of secondary evidence at the instance of the defendant, the deed not having been produced.
2. Where a deed is not produced after due notice to the party having the control of it, the court will be liberal in the application of the rule, which allows secondary evidence; and though there be no direct evidence of the identity and execution of the deed, proof of circumstances, tending to establish these facts, is admissible, and proper to be submitted to the jury.

Error to the Circuit Court of Tallapoosa. Before the Hon. George W. Stone.

This was an action on a promissory note made by James Young, Reuben G. Young and William Winslett, in favor of the plaintiffs in error. James and Reuben G. Young did not defend, but suffered a judgment to go against them by default. Winslett appeared to the suit, and relied for his defence on the facts, that he was but the surety of said James and Reuben G. Young, and that the plaintiffs had upon valuable consideration, and without his consent, given day to the said James and Reuben G. To make out this defence, Winslett propounded interrogatories under the statute to the plaintiffs, and, among other things, inquired about a deed of mortgage executed by said James and Reuben G. Young to them, to secure the note sued, and asked them to attach it to their answer. They replied that they had received a deed of mortgage from the said James and Reuben G., but that they did not recollect what particular notes it was made to secure, and that it was in the hands of their attorney, Seth P. Storrs. Col. Storrs was then examined at the instance of said Winslett, and deposed, that he had not had the said mortgage in his possession for the last five or six months. Col. Storrs, some time prior to his examination, had abandoned the cause, and it had come under the management of Reuben Shorter, Esq. A notice to said Shorter, as the plaintiffs' attorney, to produce said deed at the trial, was shown to have been served on him about six months before. The defendant Winslett, (the deed not being produced,) then offered in evidence a certified copy of it from the office of the clerk of the county court of Tallapoosa county, and in connection with the testimony of Col. Storrs, who was a subscribing witness, but who did not identify it with any degree of certainty, introduced other circumstantial evidence of its execution and identity, but no direct proof of either. The court admitted the copy deed, by which it appeared that the said James and Reuben G. Young had procured from said plaintiffs an extension on the note sued on. To the admission of the copy deed the plaintiffs excepted, and now assign as error:

1. That the defendant Winslett did not lay a sufficient predicate for the admission of secondary evidence of the contents of the deed, and that the court erred in admitting the copy.

2. That the proof of the execution and identity of the deed was not sufficient to authorize its admission in evidence.

J. Falkner, for plaintiff in error.

The notice to Mr. Shorter to produce the mortgage was served on him 14th October, 1846. This was on the coming in of Ledyard's answer. Mr. Shorter was not the attorney of record, but was merely representing Col. Storrs. Defendant's attorney proved that one week after the spring term, 1847, said deed or mortgage was delivered by him to Col. Storrs. This was after Col. Storrs had abandoned the suit, and another attorney had taken the management of it, and after the notice to Mr. Shorter.

On the 9th of October, 1847, Col. Storrs answers that the mortgage was not, and had not been in his possession for five or six months.

The *sub. duces tecum* was executed on the day the interrogatories were answered, after the mortgage had gone out of his possession, and after he had ceased to have any thing to do with the management of the cause.

The mortgage is not shown to have been destroyed, or in the power or control of plaintiff or his attorney, one of which was necessary to authorize the secondary evidence. See Thompson v. Ives, 11 Ala. Rep. 239, and authorities there cited.

All these facts were known to defendant before he announced himself ready for trial.

W. W. Morris, contra.

CHILTON, J.—The main ground relied upon by the plaintiffs in error to reverse this cause, is the admission of secondary evidence of the contents of a mortgage deed executed by J. and R. G. Young to them. This deed, which was executed and delivered to them, and which remains unsatisfied, the law presumes to be in their custody, and it was their duty, if they apprehended any injury from an imperfect description of it by witnesses, or from the introduction of a copy, to have produced the original.

One of the plaintiffs, in answer to interrogatories propounded to him for a discovery as to the mortgage sought to be proved, says it was in the possession of Mr. Storrs, the attorney for the plaintiffs in error, at the time of his answering the interrogatories. Mr. Storrs was then examined, and answered, that he had seen a mortgage deed from the Messrs. Youngs to the plaintiffs. That he was a subscribing witness thereto; so also was George C. Ball; but having been casually called on to witness it, while he happened to be at the office of Mr. Ball in Montgomery, he did not read it or hear it read. He further stated, that he did not have the mortgage, and that it had not been in his possession for some five or six months prior to his examination.

It further appears, that some twelve months anterior to the trial, a notice had issued and was served upon Mr. Shorter, to whose management, as an attorney, the cause had been transferred by Mr. Storrs, to produce said mortgage on the trial. The same not having been produced, a certified copy from the record of the county court was allowed to be read.

The rule requires a party to adduce the best evidence of the fact to be proved, of which the nature of the case admits, and which is in his power to produce. In the case before us, the mortgage deed was made to the plaintiffs in error. They were the mortgagees, and it is clear from the proof, that the deed became operative by delivery. The law then, in the absence of other proof, presumes them to be in possession of it. Rex v. Leicester, 1 Bar. & Ald. 173; 3 Phil. Ev. 1187, n. 837, and cases there cited. The notice given the attorney who was then managing the cause for the plaintiffs, to produce the deed on the trial, described the deed, and was sufficient; it operated as notice upon the plaintiffs, and upon the attorney who subsequently came into the cause. Clay's Dig. 337, § 137; 1 Mood. & Rob. 242. Reasonable diligence is all the law requires the defendant to exercise in order to procure the better testimony. We think the diligence disclosed by the record altogether sufficient in this case. In order to establish the instrument, and procure its production, the defendant examined one of the plaintiffs in the action. Finding by the answer of the plaintiff, that the deed was in possession of Col. Storrs, he is next examined, but he had

parted with its possession some five or six months previous to his examination. He was also summoned by *subpœna duces tecum*, to bring the instrument into court. Col. Storrs having abandoned the suit, the attorney who represented him was notified to produce it upon the trial. Now, if under such circumstances, secondary evidence may not be admitted of its contents, it would be difficult to conceive of a case where it should be allowed.

It is true, as insisted upon by the plaintiffs' counsel, that the execution of the instrument must be proved, notwithstanding secondary evidence of its contents may be allowed. In this case, however, the subscribing witness was examined, and although he cannot speak of the contents, not having read it or heard it read, still he deposes to certain facts, which may properly go to the jury as identifying and establishing the copy offered from the records of the county court as being correct. When a deed is not produced after notice, and it is shown to have been under the control of the adverse party, the court will be liberal in the application of the rule which allows secondary evidence, and so apply it as to promote the ends of justice. So it is held, that where no direct testimony on the point of execution or former existence of an instrument is attainable, the fact may be proved by circumstances. Gillespey v. Woolsey, 1 Johns. Rep. 446. So also, where a deed to land was lost, and the witness who testified as to its existence remembered that there were subscribing witnesses to it, but did not know their names, and it not appearing that the party seeking to establish the deed had the means of knowing them, held he might prove the deed by the acknowledgments of the opposite party. 7 Wend. 125. The proof made by Col. Storrs was relevant, and properly submitted to the jury in connection with the copy from the register of deeds. Whether it sufficiently proves and identifies the copy, was a question for the jury. In such cases, although the proof may be vague and uncertain as to dates, sums, &c., every intendment and presumption are against the party who might make the whole matter plain by producing the deed. 3 Phil. Ev. 1192.

The plaintiffs, having failed to produce the deed in accordance with the notice, they cannot object that they were not

afterwards required to produce it upon the examination of their attorney before commissioners. If they desired to have the best evidence, the deed itself, it was under their control, and it had already been called for, but not produced. They then submitted that the witness might give his best recollection, as to its existence and contents. The cases relied upon by the plaintiffs' counsel, of Thomson v. Ives, 11 Ala. Rep. 239; Thomas v. Wallace, 5 Ala. Rep. 268; and Lazarus v. Lewis, Ib. 457, do not in the least militate against the views above expressed. We can discover no error in the judgment of the circuit court, and it is therefore affirmed.

TRIPPE, Ex'r, v. JOHN, Adm'r.

1. Where an antenuptial contract secures to a trustee, for the separate use of the wife, "all the property of every description, to which she is, or may be entitled by inheritance, or otherwise whatsoever," and the wife subsequently, by the death of an aunt and a sister, becomes entitled, as one of their distributees, to several slaves, which the husband receives the possession of, by virtue of a power of attorney from the trustee, and which, during his life, he acknowledges and recognizes as the separate property of the wife under the antenuptial contract, on the death of the husband, the right to such slaves does not vest in his personal representative, but survives to the wife.
2. Where a wife, having the power, under an antenuptial contract, to convey her separate property by deed, in consideration of a provision made for her in the will of her husband, executes to M. A. T. and W. F. T., his children by a former marriage, a deed of "all the property that she held in her separate right," and which concludes with a stipulation, "that said property is hereby fully and freely incorporated with his (her husband's) estate, and all manner of contracts, settlements or legal hindrances to the attainment of that end are hereby waived, I reserving the right, as a consideration herefor, to become an equal heir in the estate of my husband with his children, who are the parties to the second part in this deed"—Held, 1. That the deed creates no interest in the husband or his personal representattive, but vests the property in M. A. T. and W. F. T. the children of the husband. 2. That the deed is supported by a suffi-

cient consideration. 3. That the deed is not void for uncertainty in the description of the property. 4. That the delivery of the deed was a sufficient delivery of the property.

Error to the Circuit Court of Perry. Before the Hon. S. Chapman.

This was an action of detinue, brought by the plaintiff, as executor of Henry Trippe, deceased, against the defendant as administrator of Mary A. Trippe, deceased, to recover the possession of four slaves. By a bill of exceptions found in the record, it appears, that after the plaintiff had adduced proof tending to show the possession of the slaves in controversy, by said Henry, during his life time, and by the plaintiff as his executor, since his death, until dispossessed of them by defendant, the defendant introduced an antenuptial contract entered into between said Henry and Mary A., then Mary A. Harris, and Rowe Harris, the trustee therein, which provides, that "whereas, the said Mary is possessed, or entitled by inheritance, or otherwise, to certain property, consisting of lands, slaves, &c., and the said Henry having agreed, that if the said marriage shall take effect, then, notwithstanding the same, the said Henry, his executors, heirs, and assigns, shall not, and will not, have any right, or title to any part of the said property, to which said Mary is, or may be possessed of, or entitled to, in any wise or manner whatsoever, but the same shall remain and be the separate property and estate of her, the said Mary, now this indenture witnesseth, that for the purpose of making the said agreement effectual, and preserving the property to the said Mary, and for her separate use, so that the same shall not be in the power, or disposal of the said Henry, he, the said Henry, doth for himself, his executors and administrators, covenant to and with the said Rowe Harriss, &c., that notwithstanding the said intended marriage, all the estate and property of her, the said Mary, shall be recognized and taken as a distinct and separate estate, of and from the estate of him, the said Henry, and be no wise subject or liable for his contracts, or the payment of his debts, and the labour and increase that shall hereafter be gotten or gained from the said slaves, and

their increase shall be employed or disposed of in such manner, and for such purposes, as is hereinafter mentioned, to wit: that the increase of the female slaves shall be and remain the distinct and separate estate of the said Mary, and the labor and services of the said slaves shall be under the control and for the benefit of the said Henry, during the joint lives of them, the said Henry and the said Mary, and all the separate and distinct estate before described, or allotted to the said Mary, and the natural increase thereof, shall be had, taken, held or possessed from and after the decease, of him, the said Henry, or of the said Mary, in case she should die first, by such person or persons, and for such use or uses as she shall at any time or times hereafter, during her life, remit, order or dispose of the same, or any part thereof, either by her last will and testament, or by any writing whatever, signed with her hand in the presence of two or more witnesses, and that the said Henry, doth for himself, his heirs, executors and administrators, covenant to and with the said Rowe Harris in manner following, to wit: that he, the said Henry, will permit and suffer the said Mary to give, grant and dispose of her separate estate as she shall think fit, by will or otherwise, as above mentioned, &c. And the said Mary, in consideration of one dollar, to her in hand paid, and for the consideration and purposes before mentioned, doth hereby sell, transfer and convey, and confirm unto the said Rowe Harris, and his heirs and assigns, all the right, title, claim and interest of her, the said Mary, in and to the effects and property which she now is, or may hereafter become entitled to, from the estate of Henry Harris, deceased, and all property of every description which she is, or may be entitled to by inheritance or otherwise, whatever. In trust, nevertheless," &c. It also appears that Henry Trippe, whilst he had the possession of said slaves, admitted that he held them in right of his wife, as her separate estate, and not as his own property, and that the plaintiff also, whilst they were in his possession, recognized her right to them as her separate estate. It further appears, that a few hours before the death of said Henry Trippe, the said Mary A. executed a deed to Martha A. and William F. Trippe, children of the said Henry, by a former marriage, by which, in con-

sideration of the provision made for her in the will of said Henry, made on the same day, she gave to them "all the property that she held in her separate right," &c., and which concludes with the following stipulation, "said property, both real and personal, is hereby fully and freely incorporated with his (Henry Trippe's) estate, and all manner of contracts, settlements or legal hindrances, to the attainment of that end is hereby waived, I reserving the right, in consideration hereof, to become an equal heir in the estate of my husband, with his children, who are the parties to the second part in this deed." On the day of the execution of this instrument, the said Henry made his will, and therein provided for the said Mary A. equally with his said children, but his estate has since been declared insolvent. Some of the slaves sued for were received as the distributive share of said Mary in the estates of Mrs. Dawson, her aunt, and Mrs. Creagh, her sister, both of whom died, during the existence of the marriage between the said Henry and Mary A.; those which came from the estate of Mrs. D. were received by said Henry, under a power of attorney from Rowe Harris, the trustee of Mrs. Trippe, and those from the estate of Mrs. C. under a power of attorney from the trustee of Mrs. C., authorizing the said Henry to receive them from her administrator.

The court charged, the jury—1. That the antenuptial contract vested a separate in the defendant's intestate, of all the property she possessed at the time of the marriage; that if the jury believed from the evidence, that it was the intention of the parties to include in it any property that Mrs. Trippe might afterwards receive, then said property would be in the same situation with that possessed by her at the time of the marriage, and that in ascertaining that intention, the jury could look to the acts and declarations of the parties.

2. That the deed to Martha A. and William F. Trippe was in accordance with, and a valid exercise of, the power reserved to Mrs. Trippe in the antenuptial contract; that it was a gift to the children of Henry Trippe, and not to Henry Trippe himself; and that the plaintiff, as the executor of said Henry, has no right of action under it.

To which charges the plaintiff excepted, and now assigns them as error.

A. Graham, of Perry, for plaintiff in error.
John & Byrd, for defendant.

CHILTON, J.—This was an action of detinue, by the plaintiff in error, as executor of Henry Trippe, against the defendant, as administrator of Mary A. Trippe, to recover certain slaves, which the plaintiff insisted were the property of his testator.

The question of title mainly depends upon the construction of the documentary evidence offered upon the trial, and which is set out in a bill of exceptions, namely—1. An antenuptial agreement, entered into between the plaintiff's testator and the intestate of the defendant, before the solemnization of the rights of matrimony between them. 2. A subsequent deed by the wife, executed contemporaneously with the will of the husband, disposing of her interest in the property.

It is insisted by the plaintiff in error, that the antenuptial agreement only bound the property which Mrs. Trippe, then Miss Harris, had in her possession, and did not embrace the property which descended upon her from her aunt, Mrs. Dawson, and her sister, Mrs. Creagh, which was acquired subsequent to the execution thereof. This construction is not warranted by the terms of the agreement, which very explicitly provides, that her intended husband shall take no right or title to any part of the property of which she is, or *may be possessed, or entitled to in anywise or manner whatsoever.* And in another part of the same instrument, she conveys to the trustee, Rowe Harris, "all the right, title, claim, and interest of her, the said Mary A. Harris, in and to the effects and property to which she now is, or may hereafter become entitled from the estate of Henry Harris, deceased, and all property of every description to which she is, *or may be entitled by inheritance or otherwise whatever.*" It would be difficult to use language more explicit, and more appropriate to exclude the husband's representative from any participa-

tion in property which should thereafter accrue to the wife by descent, than is here employed, when construed in connection with the other portions of the instrument conveying the same to a trustee, the said property to be and remain the separate property of the wife—in nowise subject to his contracts, or liable to the payment of his debts. The labor and services of the slaves are to be under the control of said Henry, her intended husband, after the consummation of the marriage, during their joint lives. The increase of the female slaves to remain her separate property, and upon the death of either of the parties, the property so limited shall vest in the person to whom said Mary shall, by deed, will, or other writing, signed by her in the presence of two or more witnesses, order, &c.

Under the state of the case made by the facts set forth in the record, it becomes unimportant for us to inquire, whether the anticipated acquisition of property by Mrs. Trippe, at the time she entered into the antenuptial agreement, "by inheritance, or otherwise whatsoever," would embrace the property which was subsequently acquired as her share from the estates of Mrs. Dawson and Sarah Creagh. The rule of law in respect to such agreements, undoubtedly is, that nothing is embraced which is not within the view and contemplation of the parties at the time of entering into the contract. Atherly on Mar. Set. 25; 1 Ves. 507; 2 Ib. 304; Williams v. Williams, 1 Bro. Ch. Rep. Amer. ed.) 139, marginal, p. 152. Perhaps the terms, or 'otherwise whatsoever,' could not be properly construed to embrace property *unexpectedly* obtained, otherwise than by inheritance, nor to the earnings of the wife during coverture, which, as against the husband's creditors would be fraudulent. Keith v. Woombell, 8 Pick. Rep. 211. Nor need we enter into the discussion as to whether the anticipated interest of the wife by inheritance, was a contingent interest, capable of being assigned, or a *mere possibility*, which may not be transferred. The record clearly shows, that the husband received and held this property, not *as husband*, but in strict subordination to the right of the wife, which right he continued to recognize up to his death, and which his representative has recognized since his decease. So that the husband having asserted no

title or dominion over it *jure mariti*, but having held it as the property of the wife, subject to the agreement he had entered into, her right by survivorship is complete. Johnson v. Uren, 3 Stew. Rep. 172; Mayfield v. Clifton, Ib. 372; Bibb v. McKinley et al. 9 Por. Rep. 636; Terrell v. Greene et al. 11 Ala. Rep. 216; 1 Wms. Ex'rs, 557; Wall v. Tomlinson, 16 Ves. 413; see also, Hill on Trustees, 415.

In respect to the agreement, it may be sufficient to observe, that it is the duty of the court to carry it into effect if its provisions be lawful, according to the intention of the parties, and that the intention of the parties in this case, to exclude the husband from any right to the slaves beyond the *usufruct* for the joint lives of himself and wife, is too apparent from the face of the instrument to need comment. We know of no rule of law, and no case has been cited denying to the parties before marriage, the right to make such contract. Hill on Trustees, 408.

We must presume that the trustee of Mrs. Creagh had a right to receive her share of the estate of Mrs. Dawson, as there is nothing appearing upon the record to raise a contrary conclusion, and the representative of Mrs. Creagh delivered the property to Henry Trippe, in virtue of a power of attorney, received from such trustee. This property the husband regarded and held as his wife's, under the marriage contract, and there is no evidence that he held it as a bailee, for the trustee, or that either of them so considered it. So that, in our judgment, the plaintiff, as executor of Henry Trippe, can found no right to recover upon the idea of a bailment, against the repeated declarations of his testator to the contrary.

By the terms of the antenuptial agreement, Mrs. Trippe had the power of disposing of the property by will, or deed, signed in the presence of two or more witnesses. The bill of exceptions contains a deed of gift from her to Martha and Warren F. Trippe, of all the property which then belonged to her, or was her's in her separate right, at and before the marriage with the said Henry. The deed declares, "that said property is hereby fully and freely incorporated with his (the said Henry's) estate, and all manner of contracts, settlements, or legal hindrances to the attainment of that end, are

hereby waived; I (the said donor) reserving the right, as a consideration herefor, to become an equal heir in the estate of my husband with his children, who are the parties to the second part in this deed." This deed was signed and executed as the articles of agreement entered into previous to the marriage provided, and appears also to have been recorded.

It is insisted on the part of the plaintiff, that the effect of this deed is, to vest the property in the estate of the husband —in other words, to incorporate it in his estate, so as that after the debts of his estate are paid, the balance will remain for distribution among his distributees; while the defendants contend, that it is void and inoperative, because—1. Made without the knowledge of the trustee in the marriage settlement. 2. There was no consideration—not a good one, the donees being strangers, nor yet a valuable one, the estate of the husband being insolvent. 3. There was no delivery of the deed, or the property conveyed, &c. 4. For uncertainty, both as to the grantees and the property sought to be conveyed.

As to the first objection, it is only necessary to say, that the deed of settlement, which confers the power of appointment, does not provide for the concurrence of the trustee in the execution of the power. And in the absence of such power reserved in the deed, the wife being vested with a separate estate, might, notwithstanding the intervention of a trustee, dispose of it without his consent. It is proper, where a fund subject to a power is vested in a trustee, that notice of the appointment should be served upon him, but this is only required to fix the liability of the trustee, in cases where he has paid out the fund to a subsequent appointee after such notice of the prior appointment. 1 Sug. on Powers, 257; Cothway v. Sydenham, 2 Bro. Ch. Rep. 391, Am. ed. 312. The case before us involves no such controversy.

As it respects the *consideration* for the deed of the wife to the husband's children, we regret that the case is too barren of circumstances to enable us to pronounce a satisfactory judgment upon it. It was certainly competent for the wife to have given her separate estate to the children of her husband, and the delivery of the deed, as has been frequently decided by this court, is effectual to vest the property. This

delivery we must intend from the language of the bill of exceptions, which states that the *execution* of the instrument was duly proved. But it is insisted, the face of the instrument shows, that the consideration was to be valuable—namely, the provision made for the grantor, by her husband, in his will of even date with the deed. The provision made in the will, is, that the wife take one third of the testator's property, both real and personal, after his debts are paid, and some specific legacies are deducted. It is shown that the estate of Henry Trippe, has been reported insolvent by the executor to the orphans' court, and that the court has so declared it, and from this it is argued that Mrs. Trippe, or rather, her administrator, can obtain nothing from the estate as an equivalent for the deed, and that it is *nudum pactum.* This argument cannot be sustained. The husband is neither a party or privy to this deed, so far as we are advised by the facts of the case. The deed is to operate as between the wife and the children. As to them it was purely voluntary, as the children were to part with nothing in consideration of its execution. Upon its delivery, their interest became vested, and nothing remained for them to do. In other words, the gift was perfected. But allowing that there was an understanding, or agreement, between the husband and wife, that he would insert in his will the provision which is therein made for the wife's benefit in consideration of the deed, it by no means follows that the deed shall be void, because his estate has been declared insolvent. There is no evidence of any fraud on the part of the husband—no importunity, or the exercise of undue influence. Indeed the circumstances repel the inference of conduct so unnatural; for in five days thereafter, the then flickering lamp of life became extinguished, and it could hardly be supposed, that the last hours of his existence should be employed in perpetrating a fraud upon the disconsolate partner in his sorrows, to whom he committed the custody and education of his orphan daughter, and towards whom he entertained the tenderest affection.

At the arrangement was entered into, perhaps it was impossible to arrive at any certain or satisfactory estimate of what would remain after the payment of the husband's debts. Much would depend upon the fluctuation in the value of the

property, and its management and preservation, as to whether a surplus would remain. The provision made by the will, must therefore, in the nature of things, have been contingent, but as we have seen a contingent interest may be transferred by deed, and *a fortiori* by will, this provision furnished a sufficient consideration in law to support the deed. And why may we not suppose the wife contracted with a knowledge of the doubtful character of the provision made by the will for her? Having no children of her own, nor brothers nor sisters, was there any thing unnatural in her desire to provide for the infant children of her husband, then shortly to be cast upon the world without father or mother? We think not. Were the wife complaining, a court of chancery, which, while it allows the wife to sell, or even give her separate estate to her husband, yet views the transfer with a jealous eye, would narrowly scan the transaction, and perhaps would set aside the deed, or decree a suitable maintenance to the wife out of the property. Be this as it may, she has gone hence, and so far as we are advised, was satisfied with the deed which she made, at least the record shows no effort to repudiate or set it aside. Under such circumstances we cannot do otherwise than come to the conclusion, that the deed is valid at law, and vests the estate as is therein provided. Clancey's rights of married momen, 247, *et seq.* and cases cited. The objection as to there being no delivery, we have already noticed; and as to the uncertainty complained of, it is sufficient to remark, that a particular description of the property is unnecessary. It is enough that the grantor in general terms designate the property, so that with reasonable certainty it can be identified. This she has done in the deed before us, by conveying all the property that she held in her *separate right*, &c.

We do not, however, agree with the counsel for the plaintiff in error, that the property specified in the deed is so incorporated, or merged in the estate of Henry Trippe, as to belong to and form assets in the hands of his executor. The property is conveyed to the children, not the husband. They take it, not as distributees of the father, but by virtue of the deed, as a gift from Mrs. Trippe. If she had intended the property to vest in her husband, so as to have enabled him to dispose of

it by his will, the conveyance of it would most undoubtedly have been made to him, as the usual and appropriate mode of transfering the title; such not being the case, we cannot intend that by the terms, "such property is hereby fully and freely incorporated with his estate," &c., the wife meant to vest him or his executor with the title. We think the true construction of these expressions, and that which accords with the evident intention of the don r is, that her separate property should be so identified with whatever estate of the husband might remain for distribution, or in the words of the deed "incorporated with it," as to form a common fund in which she and the two children were to share equally. This construction gives effect to each clause in the instrument, and is the only one which will; and at the same time does no violence to the language employed. The legal effect of the deed, according to our view, is not to vest any title in the husband, or in his executor, but designates it as a fund to be shared equally between Mrs. Trippe and the two children, in common with whatever remains of the husband's estate for distribution.

The charges of the court are substantially in accordance with the law as we have above ascertained it, and the judgment is consequently affirmed.

BRANCH BANK AT MONTGOMERY v. BROUGHTON AND DUPREY.

1. Where a plaintiff suffers a term to elapse betwen the return of his first execution, and the issuance and delivery to the sheriff of an alias, the lien of the first is lost and a junior execution issued and delivered to the sheriff, before the alias is sued out, acquires a superior lien.
2. Although, when property is levied on under an execution and bond is given to try the right, it is in the custody of the law, and not subject to the levy of other executions, which have not a superior lien, this does not

affect the lien of those executions, that have been regularly renewed, on the surplus that remains from the sale of the property, after discharging the older execution. In such a case, the lien is suspended, not lost.

3. If a plaintiff in execution, after it has been levied on property of the defendant, instructs the sheriff to stay further proceedings thereon, this in law is constructively fraudulent as against junior judgment creditors, whatever the motive may have been which induced the instruction, and its lien will be postponed in favor of other executions that have issued and been delivered to the sheriff, before the plaintiff sues out an alias.

Error to the Circuit Court of Barbour. Before the Hon. J. D. Phelan.

This was a motion to the court for an application of a sum of money in the sheriff's hands, raised by the sale of a slave, as the property of John P. Booth, against whom the plaintiff, and each of the defendants in error, had obtained judgments and executions. By the record it appears that the facts were agreed on, and are as follows:

1. An execution in favor of Broughton was issued and delivered to the sheriff, on the 24th April, 1847, and an alias on the 21st October, 1847. The first of these was returnable to October term, 1847, and the other to April term, 1848, of the circuit court of Barbour.

2. An execution in favor of Duprey was issued and delivered to the sheriff on the 26th April, 1847, and an alias on the 25th October, 1847. These executions were returnable to the same court that B's were.

3. An execution in favor of the bank was issued and delivered to the sheriff on the 30th September, 1846, and levied on said slave on the 5th October, 1846, and on the 29th of the same month, a few days before the return day of the execution, the plaintiff instructed the sheriff to stay further proceedings thereon. This instruction was given, because another execution in favor of the bank, having a superior lien had been levied on the same slave, a claim interposed, and bond given to try the right of property. An alias was issued and delivered to the sheriff on the 22d September, 1847, as soon as practicable after the trial of the claim case, and the condemnation of the property therein, and a pluries on the 14th December, 1847. These executions issued from the

circuit court of Montgomery, the terms of which are held in May and November. The money in controversy was a surplus, that remained after discharging the bank execution, under which the property had been condemned and sold.

On this state of facts, the court ordered the money to be applied to the executions in the order in which they stand in the above statement, to which the bank excepted, and which it now assigns as error.

Cochran and Sayre, for plaintiff in error.
Buford, for defendants.

CHILTON, J.—We think there can be but little doubt as to the correctness of the decision of the court below upon the facts presented. The statute declares "that the lien created by the delivery of an execution from a court of record to the sheriff, shall continue to bind the property of the defendant as between different judgment creditors in the courts of record in this State, in the following manner, viz: If a term shall elapse after the return of the first execution, before an *alias* shall be sued out and delivered to the sheriff, the lien created by the delivery of the first execution shall be canceled, and of no avail; but if a term shall not have elapsed, and the *alias* shall be delivered to the sheriff before the sale of the property under a junior execution in favor of another creditor, the lien shall continue, notwithstanding such *alias* may not have been delivered until after such junior execution; but if such *alias* shall not be delivered until after the sale under such junior execution, the lien of the latter will prevail." Clay's Dig. 209, § 43. Now, the property of the goods of the defendant being bound only from the time the writ of execution is delivered to the sheriff, (Clay's Dig. 208, § 41,) and there having been the lapse of a term between the issuance of the first execution of the bank, which was the 30th September, 1846, and the issuance of the second, the 27th September, 1847; and the executions of Broughton & Duprey having been delivered to the sheriff in April, 1847, it would seem to follow, from the language of the statute, that the lien of the latter executions is superior to that of the bank. McBroom & Turner v. Rives, 1 Stew. Rep. 72; Carey v.

Gregg, 3 Stew. Rep. 433; Mills v. Williams, 2 S. & P. 390; Collingsworth v. Horn, 4 Stew. & Porter, 237.

Let us proceed to inquire whether the levy, and peculiar situation of the property, may, notwithstanding this chasm, preserve the lien. It appears that after the sheriff had levied upon the slave, the proceeds of the sale of which are now in controversy, and had indorsed the said levy upon the first bank execution, he was instructed by the bank to stay further proceedings under said *fi. fa.* This instruction was given a short time previous to the return day; and the reason for giving such instruction is stated in the record to be, that a claim had been interposed, and bond given upon a levy made under another *fi. fa.* of the bank on the same slave. It is insisted by the attorney for the bank, that this levy gave a prior right of satisfaction which was not affected by the instructions, inasmuch as the right to the slave levied upon was then being tried under a levy made upon said slave, under another execution upon a different judgment in favor of the bank.

It has been several times decided by this court, that property levied upon, and for which a claim has been interposed under the statute, and a bond given to try the right, pending said claim, is in the custody of the law, and not subject to be levied upon by other executions not having a prior lien. McRea & Augustin v. McLean, 3 Porter's Rep. 138; Pond v. Griffin, 1 Ala. Rep. 678; Rives & Owen v. Wilborne, 6 Ala. Rep. 45, 48. But it does not follow, that because the property is considered in the custody of the law, and consequently not liable to seizure upon a levy, that the lien of executions which would be entitled to the surplus which may remain after satisfying the execution under which it was condemned, is lost or destroyed. The lien in such case, if executions are regularly kept up, is suspended, not lost. Langdon v. Brumby, 7 Ala. Rep. 52. The property of the defendant in the execution is not the less his, because a false or unfounded claim has been asserted to it by a third party. Upon a sale of it by the sheriff, the proceeds will be applied to the satisfaction of the oldest liens, and the *fi. fa.* under which it is condemned, may be postponed to an older *fi. fa.*, regularly kept up from term to term. 7 Ala. 52, *supra.* We think it

would be an erroneous construction of the statutes which authorize the replevy of property under attachments, or the trial of the right thereto, to hold, that proceedings under them should have the effect to interfere with the liens of creditors. Such was not the intention of the framers of these laws, and we can readily perceive how the most mischievous consequences would result from such construction. The right to levy and sell is the means which the law affords for rendering the lien effectual, and the suspension of this right by the act of a third party, over which the creditor had no control, ought not—cannot destroy his lien.

Has the execution of the bank lost its priority from the order given by the plaintiff to stay all further proceedings under the execution? This question was so elaborately investigated in the case of Wood v. Garey, 5 Ala. Rep. 43, that it would be useless again to review the authorities there collated and commented upon. In that case, a majority of the court hold, that to render an execution dormant, or in other words fraudulent, there must be some act of the plaintiff inconsistent with the pursuit of the defendant by execution to obtain satisfaction of the judgment. That the mere delay of the plaintiff in not compelling the sheriff to levy and sell, will not raise the presumption of fraud; but to produce this result, there must be instructions from the plaintiff to delay the seizure, or to let the executions sleep in the sheriff's hands. In the case from which I have quoted, the party whose execution was sought to be postponed had ordered it to be returned a few days before the return day, and the court held this did not work a forfeiture of the lien, and could not be constructively fraudulent. In this case, the plaintiff ordered the sheriff to stop proceedings under his execution, and did not issue another *fi. fa.* until near a year afterwards.

If the instruction of the plaintiff to stop further proceedings, after the sheriff had made a levy, is in law constructively fraudulent as against junior judgment creditors, the motive which prompted the instruction is unimportant as affecting the result. If the act in judgment of law be *per se* fraudulent, the motive, however innocent or benevolent, is not the subject of inquiry. Now, in the case above referred to, it is stated as the clear result of the adjudged cases, that

if the creditor place his execution in the sheriff's hands, with instructions not to levy; or after a levy, to hold it up and not to sell, it will be constructively fraudulent against junior judgment creditors, who will thereby obtain the superior lien.

The case to which we are referred by the counsel for the bank, of Power v. Van Buren, 7 Cow. 560, (if it can be considered as correctly settling the law as to the motive for delay,) is not analagous to the case at bar. In that case, the sheriff levied upon a quantity of hides in the vats undergoing the process of tanning, which could not be taken up and sold without sacrificing most of the labor already bestowed upon them, with the bark used in tanning, and the sale could not have been made with advantage until warm weather in the spring. Under such circumstances, the sheriff was instructed that there need not be a sale until about the first of May, the levy having been made in the previous autumn. The court approved the reason given for delaying the sale, and say the *fi. fa.* did not thereby become dormant. In the case before us, the sale of the slave levied upon is not postponed to await the decision of the court upon the former levy, but all further proceeding under the execution is stopped, so that if the defendant had been possessed of never so much property, or had acquired such property before the return day of the writ, the sheriff could not, without a violation of his instructions, have proceeded. The books abound with authorities to show that such instructions or interference on the part of the plaintiff will postpone the lien to junior executions. See Kempland v. McCauley, Peake, 66; United States v. Conyngham et al. 4 Dallas, 358; Berry v. Smith, 3 Wash. C. C. Rep. 60; J. & B. Knomer v. Barnard et al. 6 Hill's Rep. 377; Keelog v. Griffin, 17 Johns. Rep. 274; Benjamin v. Smith, 4 Wend. Rep. 336; s. c. 12 Wend. Rep. 405; Loverick v. Crowden, 8 B. & C. 132.

The case of Rankin & Shatzell v. Scott, 12 Wheat. Rep. 177, has no application to the case before us. In that case, the controversy was between different purchasers of real estate bound by judgments; the land was sold under the junior judgment, and afterwards a sale was made under the older judgment, and it was held that the last sale under the *statute of Missouri* passed the paramount title. The question here

is not mere delay in proceeding to sell, but the plaintiff has actively interfered and stopped all proceedings under his execution, and under the circumstances, we cannot do otherwise than consider the execution as though it had not existed, and as having no influence upon the lien.

It is further insisted, that although the sheriff had no right to levy upon the property, yet as he did make the levy under the bank execution, this confers a lien, notwithstanding the instruction to stop further proceeding, and the intervening lapse of a term. Now it would seem necessarily to follow, that if the sheriff had a right to seize the property, by virtue of the execution, it must be for the purpose of disposing of it according to the mandate of the writ. The levy properly made, vests a qualified property in chattels in the sheriff, and he is bound by law to dispose of it in satisfaction of the writ, unless he is stopped in the execution of his duty in some of the modes pointed out by law, or by direction from the plaintiff. If, on the other hand, he became a trespasser by the seizure, it was his duty, and we must presume that he discharged it, in the absence of proof to the contrary, to restore the property to the person from whose possession he had taken it. If the levy was legal, it follows the sale has been prevented by the act of the plaintiff, and according to the anthority above referred to, postpones the lien. If illegal, no lien could be created by virtue of it, as no authority could exist for a sale of the property after the return day of the execution under it.

Having arrived at the conclusion, that the claim which was interposed did not destroy, or in any way change the liens of the respective executions, (see Langdon & Co. v. Brumby, adm'r, 7 Ala. Rep. 57,) and that a lien attached, although the right to levy and make sale of the property was suspended, and the bank having forfeited the right to priority, as well by a failure to continue the efficacy of the first execution, having permitted a term to elapse, as by the instructions to the sheriff to proceed no further after a levy was made, it follows that the executions of the defendants in error, which came to the sheriff's hands in April, 1847, and were regularly kept up, overreach the lien of the bank. Russell v. Gibbs, 5 Cow. 390. Let the judgment be affirmed.

THE COMMISSIONERS OF ROADS AND REVENUE OF TALLADEGA COUNTY v. THOMPSON.

1. The commissioners' court of roads and revenue of a county is the proper defendant in a controversy involving the legality of its proceedings in the establishment of a new road, and a writ of error will lie in such case in the name of said court.
2. A judge of the circuit court in this state has the power to grant writs of certiorari, returnable to said court, to correct the errors of the commissioners' court of roads and revenue in the establishment of a new road, and take cognizance thereof.
3. The record of a court of limited jurisdiction should contain every fact essential to the validity of its judgment, and when in the record of the commissioners' court of roads and revenue in reference to the establishment of a new road, it does not appear, that thirty days notice of the application had been given, a decree establishing such road is erroneous, and properly quashed at the instance of a party injured thereby.

Error to the Circuit Court of Talladega. Before the Hon. George W. Stone.

This case arose out of the action of the Commissioners' Court of Roads and Revenue on an application for a new road. It appears by the record that at a special term of said commissioners' court, held on the 21st February, 1847, on a petition filed for that purpose, said court appointed a jury of review on the proposed road, and that at the regular May term of said court, the jury reported in favor of the road, and designated its route, &c., whereupon the court ordered it to be opened and established, and appointed an overseer thereof; that on the 12th of August, 1847, the defendant in error presented to the Hon. G. W. Stone, judge of the ninth judicial circuit, a petition for a certiorari and supersedeas, to restrain said overseer from carrying said order into effect, in which she alledges, that the said road, as marked out, will pass through her premises, and will greatly lessen their value, &c., and that the proceedings of said commissioners' court in the matter are irregular, illegal, and void, &c.; that

said certiorari and supersedeas were awarded according to the prayer of the petitioner, returnable to the circuit court of Talladega county; that on the return thereof, the said commissioners' court appeared by attorney, was on its own motion made a party to the record, and admitting the facts stated in the petition, moved to dismiss it, which motion the court overruled, and thereupon gave judgment in favor of the defendant in error, quashing and vacating the orders of said commissioners' court, appointing the jury of review and establishing said road. The record of the commissioners' court appended to the transcript, does not show that thirty days' notice of the application for the road was given.

The ruling and judgment of said circuit court is now assigned as error, and at the same time a motion is made by defendant to dismiss the writ of error.

L. E. Parsons, for plaintiff in error.

1. The circuit court should have dismissed the certiorari, because it was not sued out in the name of the State *ex rel*, &c. Moore v. Hancock, 11 Ala. 248.

2. The action of the court of roads and revenue cannot be reviewed when its subject is a public road. 11 Ala. 247. The whole subject is specially committed to them by the statute. Dig. 507, § 3. If an individual is injured, he is entitled to damages, and damages only. Dig. 507, § 5; 3 Porter, 412.

3. The proceedings in the commissioners' court are legal, as disclosed by the record. That court has the entire control of the whole subject; and every thing will be presumed in favor of its proceedings. It is not necessary the record should recite, that notice was given; that the jury of review were sworn according to law, and that they were citizens of the county, &c. &c. These things will be intended in favor of their proceedings, because the act which gives this jurisdiction is public and general, and this court must take notice of it.

Rice and Morgan, for defendant in error.

1. The writ of error should be dismissed. The commissioners' court of Talladega county, *co nomine*, is not a corpo-

ration; nor is it such a person as can sue out a writ of error. There is no responsibility for costs, and the unauthorized act of the court does not bind the people of the county.

2. The commissioners' court is a mere judicial tribunal, and cannot have any possible interest as a court, in the opening of a road. No one can maintain a writ of error who is not personally interested in the case. The Commonwealth v. Dudley, 5 Monr. 21; See U. S. Dig. Sup. vol. 1, p. 640, § 264; Alling v. Stutton, 16 Conn. 436; Tidd's Prac. 1053. It is clear that the commissioners' court are not aggrieved by the action of the circuit court.

3. The commissioners' court is of limited jurisdiction, deriving its power from the statutes alone; every fact essential to is jurisdiction must appear on the record. This jurisdiction is conferred by the act of 1836, (Clay's Dig. 507, § 3,) and none of the requisites of the law were complied with.

4. The record does not show what persons applied for the order to open the road. It does not show that thirty days' public notice was given, as is provided by law; nor indeed, that any notice was given. Commonwealth v. Coombs, 2 Mass. 489; same v. Cambridge, 7 Mass. 158.

5. The jury should have been sworn before they made the review. The statute cannot be regarded as merely directory; such a construction would defeat the common law rule, that a cause cannot be submitted to a jury until they are sworn.

6. The circuit court had the authority on a certiorari, to quash the proceedings of the commissioners' court. Burrows v. Nandiver et al, 3 Ohio, 383, is a case in point. The petition, which is admitted to be true, shows, that Sabra Thompson is directly interested in the proceedings of the commissioners' court.

CHILTON, J.—The questions for our decision are—1. Can this writ of error lie in the name of the commissioners' court? 2. Can the action of that court be reversed on *certiorari* by petition of an individual showing injury to his private property by the action of the court? 3. If the circuit court had jurisdiction, is the judgment quashing the order establishing the highway erroneous?

1. The first question involves the correctness of the order passed in the circuit court, allowing the commissioners of roads and revenue to be made a party defendant in that court. If they were proper parties to resist the petition of the defendant in error in that court, it follows, they are entitled to prosecute the writ of error in this court. The statute of 1836, (Clay's Dig. 507, § 3,) gives to the respective commissioners' courts "full power and authority to order and establish new roads; to discontinue such as have, or may at any time become useless; to alter roads so as to make them more useful and convenient, and any order of a commissioners' court by which a road is recognized as a public road, shall in all cases be *prima facie* evidence of that fact: *provided*, that said court shall in no instance grant an order to establish, discontinue, or change a public road, unless the person or persons petitioning for the same shall have given at least thirty days' notice of the intended application, by advertisement at the court house door, and three other public places in the county," &c. The second section of the act prescribes the manner in which the new road may be established, or an old one changed, viz: that a jury of seven householders shall be appointed by the court, a majority of whom may act, who shall be sworn, &c. to lay off and mark the proposed road, and report to the court. The third section provides for compensation to the owners of lands, who are damaged by the road. The act does not specify any mode for revising the action of the commissioners' court, nor designate the persons who may be made parties to a controversy impeaching the regularity of the proceedings had in the commissioners' courts. But inasmuch as the legislature has thought proper to commit to the commissioners of roads and revenue full power and authority over the subject of ways, we think there is no reason for saying they are not the proper party defendant in a proceeding to annul what they have ordered. The public, in such proceeding, should have some representative, and the commissioners whose acts are impeached, and to whom such public interests are confided, are, in our opinion, the proper parties to the writ of error. The motion to dismiss the writ is therefore overruled. It

seems that the commissioners' court of roads, &c. have been parties defendants to writs of error in this court, and that no objection was made. This is at least persuasive to show what has hitherto been deemed the correct practice. See Smith v. The Commissioners of Roads, &c. 1 Stew. Rep. 183; State *ex rel.* Driver et al. v. Commissioners of Roads, &c. 3 Porter's Rep. 412; see also Lawton et al. v. The Commissioners of Highways, 2 Caine's Rep. 179.

2. In Moore v. Hancock, 11 Ala. Rep. 245, the question is left undecided, whether a *certiorari* will lie to the commissioners' court to quash an order changing a public road, except it is sued out in the name of the State, upon the relation of the party illegally and injuriously affected. The court inclined to the opinion that it will not. In England, the court of King's Bench having a general superintendency over inferior tribunals, not only may award a *certiorari* to inferior courts, but also to persons invested by the parliament with power to decide upon the rights of the citizen, even though it is declared their action shall be final. 4 Hawk. 144. The writ, though usually granted in the name of the king, might, at the discretion of the court, be granted at the suit of the party. 1 Bacon's Ab. 349, 350. The judges of the circuit courts have power to issue writs of *certiorari* returnable to the circuit courts, so as to revise the proceedings of inferior jurisdictions. Clay's Dig. 294, § 29. So this court, possessing a general supervision over the other courts of the State, has power to correct their errors by issuing the proper remedial writs. Digest, 285, § 1; Bell et al. v. Payne & Williams, 2 Stew. Rep. 413. Several decisions of this court indicate this (the writ of *certiorari*) as the appropriate remedy in the case made by the record. Smith v. Comm'ers of Roads, &c. 1 Stew. Rep. 183; The Intendent and Council of the Town of Marion v. Chandler, 6 Ala. Rep. 900; *Ex parte* Tarleton, 2 Ala. Rep. 35; John, a slave, v. The State, 1 Ala. Rep. 95; The State *ex rel.* v. Williams, Ib. 342; see also Commonwealth v. Coombs, 2 Mass. Rep. 489; Ib. v. Hall, 8 Pick. Rep. 440; 13 Ib. 195; Lawton v. Commissioners, &c. 2 Caine's Rep. 179; 2 Binn. Rep. 250; 3 Ham. Rep. 383; 8 Verm. Rep. 271. We conclude from these and other adjudged cases which might be cited, that the circuit

court could lawfully take cognizance of this cause by *certiorari*, and that the commissioners of roads, &c. were properly admitted defendants. The act here complained of is a judicial proceeding, and should not be confounded with the acts of corporations possessing legislative, executive or ministerial powers. See 2 Hill's (N. Y.) Rep. 14, and cases there cited.

3. It remains to consider whether the judgment of the circuit court is correct. The statute above referred to requires that thirty days' notice of the application to establish a new road shall be given by advertisement, &c. Until this was done, the commissioners had no power to establish the road. The record does not show that such notice was given, or that any advertisement was made, and therefore fails to support the jurisdiction of the court. It is a well settled rule of law, that the records of a court of limited jurisdiction should discover every fact essential to the validity of its sentences. Lister v. Vivian et al. 8 Por. Rep. 375; Blann, guardian, &c. v. Grant, adm'r, 6 Ala. Rep. 110; Samuels v. Findley, 7 Ala. Rep. 634. As the application was not preceded by the notice required by the statute, and the defendant in error has been enjoined by the order establishing the road, as is shown by the statements in the petition for the *certiorari*, which were admitted in the court below to be true, it results that there is no error in the judgment quashing the order. In Commonwealth v. Coombs, 2 Mass. Rep. 489, it was held by the court (Parsons, C. J.) that the proceedings should show that notice had been given to the inhabitants of the town, and this was one of the grounds on which the proceedings were quashed on *certiorari*. In the Commissioners of Roads v. Murray, 1 Rich. Rep. 335, the proprietors of the lands over which the road passed, had given their consent to its establishment. The act required that three months' notice should be given by the commissioners previous to laying out the road, in the settlement through which it was to pass—the court held that unless the notice had been given, the commissioners had no authority under the act to open the road, and to fine the defendant for not working on it. In that case, the effort was *collaterally* to impeach the proceedings, and one of the resolutions showed that the clerk was

required "to give the notice required by law of the application to be made to the legislature to lay out said road," &c. which was ordered to be laid out about a year after the notice was required to be given, the order establishing it reciting, "the said road being a part of the road petitioned for by this board to the legislature at its last session." The court say, "the commissioners are public agents, and it is fair to presume, when they do an act, that they have complied with all the pre-requisites to the exercise of their power." This view was certainly correct under the circumstances of that case; for the regularity of the proceeding could not be collaterally impeached, when it was shown that the court had jurisdiction. But here the application is to vacate the irregular proceedings by a party injured, who propounds her interest, and the record does not show she had any opportunity to protect her interest before the commissioners' court—no notice having been given. We are clearly of opinion that it should be affirmatively shown by the proceedings, that notice had been given as the statute requires.

Let the judgment of the circuit court be affirmed.

CASES

ARGUED AND DETERMINED,

JANUARY TERM, 1849.

MEAD v. HUGHES'S ADMINISTRATOR.

1. A plea which sets out tho consideration of the contract sued on, but does not aver wherein the consideration is insufficient, is no answer to the declaration and a demurrer to it is properly sustained.
2. A plea which sets up an agreement between the parties in bar of the action, without stating the terms of that agreement, is defective, and it is not error to strike it out on motion.
3. If a husband, with no intention of returning removes from this into another state,—declares his determination to abandon his wife, and absents himself for more than five years, the law confers on her the capacity of contracting and suing, as though she were a *feme sole.*

Errror to the County Court of Jackson. Before the Hon. James M. Green, Judge.

This was an action of covenant, &c. instituted by Samuel Hughes, in his lifetime, and after his death revived in the name of his administrator, against Samuel Mead, on an instrument of which the following is a copy:

"$270. On or before the first day of January next, I promise to pay Sinthia Hickman, or William Hickman, the just and full sum of two hundred and seventy dollars of com-

mon currency of this state. Witness my hand and seal, this 8th January, 1842. SAMUEL MEAD, [seal.]"

This instrument had been assigned to said Hughes. Mead filed seven pleas to the declaration. The second plea states the consideration on which the said instrument was given, but there is in it no averment that the consideration was illegal, or had failed, &c. A demurrer was interposed to it, and sustained by the court. The plaintiff moved the court to strike out the sixth plea, which avers that said instrument is void, and of no effect, by virtue of an agreement entered into, &c. "at the time of its execution, and subsequent thereto," without stating the terms of said agreement. The court sustained the motion. The first plea was replied to by plaintiff, and the replication to that plea, and the defendant's remaining pleas, present the issue, whether, under the facts of the case, the coverture of the said Sinthia, at the time of the execution of the instrument sued on, and the agreement which constituted its consideration, is an answer to the action. The facts disclosed by the bill of exceptions are these: In 1832, the said Sinthia was married to one George Brittain, and they lived together as man and wife until the fall of 1836, when Brittain abandoned her and left the state of Alabama, protesting previous to his departure, that he did not intend to live with the said Sinthia; since then he has not returned to the state, though he has been heard of in Illinois and Kentucky. After Brittain abandoned her, the said Sinthia resided in the house of her father, with her two children, the issue of the marriage, until the death of the latter; at the sale of her father's property, after his death, she made some small purchases in her own name, and executed her note therefor; she also contracted an account in her own name with a mercantile house in her neighborhood for goods, that she needed. The instrument sued on was executed on the 8th January, 1842, to her and William Hickman, whom she had a short time before married, and whose name she had assumed, in consideration of an assignment by her and said Hickman to the said Mead, of her interest in her father's estate, then in the hands of his administrator undistributed. There is nothing in the bill of exceptions going to show that said Mead has not realized said Sinthia's interest in her fa-

ther's estate, or that he is not in the uninterrupted enjoyment of it. Numerous charges were asked by the defendant's counsel, all of which were, in effect, that if the jury believed all the facts above set out to be true, then plaintiff was not entitled to recover; the charges asked, the court refused to give to the jury, but gave the reverse thereof. The several rulings of the court above stated, its refusal to give the charges asked, and the charges given, are now assigned as error.

Clay & Clay, for plaintiff in error.

It will be perceived from the bill of exceptions, that the court below charged, that the removal of a married man from this state to another state of the Union, and living there five years, constituted "abjuring the realm," and rendered the wife, remaining here, a *feme sole*, capable of contracting as such, by selling the property of the husband, &c. What is abjuration? 1 Tom. L. Dic. 17, tit. Abjuration; 1 Co. Lit. m. p. 135. What acts a wife may do, and when treated as a *feme sole*. 1 Tom. L. Dic. 206, tit. Baron and Feme, VI. When a husband has abjured the realm, or is banished, or has been transported for felony, being disabled to sue or be sued in right of his wife, she may be treated as a *feme sole*. Ib. But *quere*, whether she can be sued as a *feme sole*, after the period of transportation is expired, and the husband not returned? Marsh v. Hutchinson, 2 Bos. & Pul. 233.

A wife may use the goods of the husband, but she may not dispose of them. 3 Inst. 308, 310. The husband being domiciled in a foreign country, will not entitle a wife to contract, unless he be an alien enemy. 2 Boss. & Pull. 226; 11 East, 301; 3 Camp. 123; 1 Bos. & Pull. 357. A *feme covert* cannot contract, bring an action, or be impleaded as a *feme sole*, though she lives separately from her husband, and has a separate maintenance secured by deed, if the relation of marriage still subsists, and she and her husband are living in the kingdom. Marshall v. Rutton, 8 T. R. 545; 1 Thos. Co. Lit. m. p. 135, note P. and so on to the end of chap. X; 2 Kent's Com. 160. In general the absence of husband affords no ground for a wife's proceeding separately. Bogget v. Frier, 11 East, 301, and note; Clancy's H. & W. 61-2-3. Chancellor Kent (2 Kent's Com. 154, 162,) examines the En-

glish cases, and concludes that the doctrine laid down in Marshall v. Rutton is well established in England, and is to be considered the law in this country.

A *feme covert* whose husband has been absent six or seven years, and who, in the mean time, has carried on business as a *feme sole*, is still a *feme covert* in legal estimation. Commonwealth v. Collins, 1 Mass. T. R. 116. In the case at bar, it was proved that the wife purchased a few articles, but not that she traded, and obtained credit generally as a *feme sole.*

In Arthur and Corprew v. Brodnax, 3 Ala. 557, the question, what amounts to abjuration from the State? was not raised; but this court merely presumed, in favor of the court below, that enough was proven, as the contrary did not appear.

S. Parsons, contra.

The note sued on was given in consideration of the interest which Sinthia Hickman had in the real and personal estate of her father, which she and William Hickman, her then husband *de facto*, at least, sold to the plaintiff in error. She was married to George Brittain, who abandoned her and left this state finally, in the summer or fall of 1836, without ever reducing her interest in her father's estate to his possession.

She married Mr. Hickman in the spring of 1841, and in 1842 she and Hickman sold and conveyed her interest in her father's land and personal estate to Mead, the plaintiff in error; and this was the consideration of the note. It does not appear but that Mead got the estate, or if not that he could not get it. The five years from the departure of Brittain had almost elapsed before the second marriage, and had fully elapsed before the sale. There is no legal proof that he was living, and none that she knew he was living at the time of the second marriage, or of the sale. But it appears that Mead knew the circumstances in which she was placed at the time of his purchase. Further, if her cohabitation with her second husband were illegal, still the sale had nothing to do with that, and she was as much bound by the sale as if her second husband had not joined in it. She was authorized to

make this sale, as Brittain had abjured. Gregory v. Paul, 15 Mass. R. 31; Clancy on H. & W. 56-7.

As land was the subject matter of the sale, and especially as it does not appear that the purchaser is not in possession, a failure of consideration in part is not a good defence. Dennis v. White, 1 Ala. 641; Cullum v. Br. Bank at Mobile, 4 Ib. 31; 1 S. & P. 71.

CHILTON, J.—We need hardly institute an inquiry as to the sufficiency of the second plea, to which a demurrer was sustained. It merely avers that the instrument sued on was executed in consideration of the sale to the plaintiff in error of the interest which Sinthia and George Brittain had in the estate of one Turner, deceased, who was the father of said Sinthia. It does not show that the consideration thus set out was illegal, had failed, or was wanting in any respect so as to render it insufficient to support the contract. It is no answer to the declaration, and consequently interposes no bar to a recovery by the plaintiff.

We think also, the court very properly rejected the sixth plea, on motion. It avers that the writing sued on was totally void, and of no effect, by virtue of the terms of an agreement entered into with the payees thereof, at the time of the execution of said writing, *and subsequent thereto.* The plea (to say nothing of its repugnant averment as to the time when the agreement was executed) does not aver what the terms of said agreement are, and thus fails to state the ground of defence. The plaintiff is not informed as to the matter he is called on to reply to, nor the jury of what they are to try. 1 Chit. Pl. 23. But as neither of these points are insisted upon by the counsel for the plaintiff in error, in their argument, we will turn to the main questions discussed, arising out of the facts and charges contained in the bill of exceptions.

As it respects the charges involving the sufficiency of the consideration, we think it clear, that the court below committed no error. It does not appear by the bill of exceptions but that Mead received, and now enjoys, all that he contracted for, and we must intend, in support of the judgment, that

such is the fact, and that he entered into the negotiation with a knowledge of the facts and circumstances under which the payees of the note transferred to him the interest to which Sinthia Brittain was entitled out of the estate of her father. There being no pretence of fraud, mistake, or surprise, in the transaction, we do not see upon what principle Mead can avoid the contract thus entered into. That he may subject himself to litigation, should Brittain sue for a part or the whole of the interest which he purchased, may prove that he made an indiscreet bargain, but certainly, in the absence of other circumstances, furnishes no reason for rescinding the contract.

It is insisted, however, that Sinthia Hickman, one of the payees of the sealed note declared upon, was, at the time of its execution a *feme covert*, and that for this reason the plaintiff cannot recover. The facts show, that she was married to one George Brittain, in 1832; that they lived together as man and wife until the fall of 1836, when Brittain abandoned her, and left the state, protesting previous to his departure, that he did not intend to live with her. There was some proof that he had since been heard from in the States Illinois and Kentucky, but he had never, in the knowledge of any of the witnesses, since his departure from the state, returned to it. After her abandonment, Sinthia resided in the house of her father, with her two children, the issue of the marriage, until his death, and at the sale of his property by his administrator, made some small purchases in her own name, and executed her individual note. Also, she had contracted an account with a mercantile firm in the neighborhood for goods. The obligation in suit was executed to her on the 8th day of January, 1842, and at the same time she and her second husband, to whom she had then lately been married, executed and delivered to the plaintiff in error their written transfer of the interest of said Sinthia in the estate of her said father, both as to his real and personal property.

We need express no opinion as to the validity of this second marriage, which was entered into before the expiration of five years from the departure and abandonment of Brittain. We will consider the case as though it had never been consummated. The question is then presented, whether, under

the facts of the case, the court below should have given the charges asked by the plaintiff in error. The substance of the charges, when construed as applicable to the facts, is, that the voluntary abandonment of the wife by the husband, and his residence in another state, as shown in the bill of exceptions in this case, did not confer upon the wife the capacity to trade as a *feme sole.*

There is no doubt but that by the rigid rules of the common law, the wife, under the circumstances here presented, would labor under all the disabilities of coverture, and the authorities cited by the counsel for the plaintiff in error show, that the settled law of the English courts, sustains the view for which he contends. The English cases however are not at all consistent upon the doctrine, as will be seen by reference to the work of Mr. Clancy on Husband and Wife, page 54, *et seq*, where the cases are collated and commented upon. But a more liberal rule, and one which we think is more consonant with reason and justice, seems to obtain in this country. In Gregory v. Paul, 15 Mass. Rep. 31, it was held, that a *feme covert*, where the husband had deserted her in a foreign country, and who had thereafter maintained herself as a single woman, and had for five years been living in that state, her husband being a foreigner, and never having been in the United States, was competent to sue and be sued as a *feme sole*, and that her release would be a valid discharge for any judgment she might recover. The judge, in delivering the opinion in that case, remarks, "miserable indeed would be the situation of those unfortunate women, whose husbands have renounced their society and country, if the disabilities of coverture should be applied to them during the continuance of such desertion. If that were the case, they could obtain no credit on account of their husbands, for no process could reach them; and they could not recover for a trespass on their persons or their property, or for the labor of their hands. They would be left the wretched dependents upon charity, or driven to the commission of crimes to obtain a precarious support."

In Abbot v. Bayley, 6 Pick. Rep. 89, it was held, that where a husband, by his cruelty, drove his wife from his house, in the state of New Hampshire, and she went to Mas-

sachusetts, where she maintained herself for more than twenty years as a single woman, the husband having always been a citizen, and residing in the state of New Hampshire, and having since her expulsion, married and cohabited with another woman, the wife was entitled to sue as a *feme sole.*—See also, Reeves' Dom. Rel. 99.

So also in Starrett v. Wynn et al. 17 Serg. & R. 130, the court say, "the question then arises when the husband has abandoned his wife, and separated from her, does his marital rights still continue so as to give him an absolute property in her acquisitions. Unless some positive rule of law intervenes, as he has cut himself loose from the duties which the relation of marriage imposes, he shall not be allowed its advantages. His conduct would amount to a virtual surrender of his rights." See also, Robinson v. Reynolds, 1 Aikin's Rep. 174; Beane v. Morgan, 4 McCord's Rep. 148; Brown v. Killingsworth, Ib. 429.

These authorities may suffice to show, that if the husband depart from this state into another, without the intention of returning, having declared his intention to abandon his wife, and having been absent, as in this case, for more than five years, the law confers on her the capacity of contracting and suing as though she were *sole.*

The doctrine of abjuring the realm, as it once obtained in England, by which the husband became *civiliter mortuous*, was an incident to the right of sanctuary, which was abolished by statute, 21 Jac. 1, ch. 28, and of course finds no place in our law. The decision of this court in Arthur & Corprew v. Broadnax, 3 Ala. Rep. 557, affirms, that if the husband has abjured the state, and remains abroad, the wife meanwhile trading as a *feme sole*, could recover on a note which was given to her as such. We must consider the term abjure, as there used, as implying a total abandonment of the state; a departure from the state without the intention of returning, and not a renunciation of one's country, upon an oath of perpetual banishment, as the term originally implied.

In the case at bar, the wife, deserted by an unfeeling husband, seeks an asylum for herself and two infant children in the bosom of her father's family, where she remains until

his death. Thus cast upon the world with her helpless offspring, without protection, and it may be without the means of support, she sells to the defendant her humble patrimony for $300, and receives the note in suit to secure the payment, and this transaction occurs more than five years from the period of her desertion. The defendant, who we must presume has received her living, now that he is sued upon the note, says he ought not to pay it, because she has a husband who may return and claim the fund. In our opinion, the husband has forfeited all claim to it, and the charges, with the qualifications, given by the court, are quite as favorable to the defendant as the law will justify.

Let the judgment be affirmed.

HADEN v. WARE.

1. A purchaser from an Indian reservee, acquires no title by his purchase, until the contract is approved by the president, when this is done the purchaser is entitled to a patent, and when it issues it vests the fee in the patentee.
2. When a patent issues to one reserving the title of all others, whether legal, or equitable, derived from W. & Co, a court of equity will subject the legal title to a superior equitable title derived from W. & Co.
3. Where one with full knowledge of all the facts constituting his title to land, purchases it of another, or compromises a controversy in reference to it, and acts on the presumption that he has no title, the mistake, if one is made, is of law, and not of fact.
4. To authorize a court of equity to interfere, and grant relief for a mistake of law, the mistake must be so gross, and palpable, as to superinduce the belief, that some undue advantage was taken of the party, from imbecility of mind, or the exercise of improper influence.

Error to the Chancery Court of Montgomery. Before the Hon. A. Crenshaw, Chancellor.

The bill which was filed by the plaintiff in error, alledges, that Cowe Hadjo, an Indian of the Creek tribe, was entitled as a reservee to the west half of section thirty-four, township seventeen, range twenty-one, east, in the Tallapoosa land district, and that he sold said land to James C. Watson & Co.; that on the 30th of July, 1839, James C. Watson & Co., for a valuable consideration, assigned, and relinquished the land, to one Robert G. Haden, by way of compromise, and settlement, of conflicting land claims, between said Haden, and said James C. Watson & Co., and that the articles of settlement were filed in the land office at Washington City, that patents might issue to the parties in conformity therewith; that complainant purchased said land of said Robert G. Haden, has paid for the same, and received a bond for titles thereto, and by virtue thereof took possession, and has made valuable improvements thereon, and has ever since occupied the land; that in the year 1845 he was informed, that a patent had issued for said land from the government to Robert J. Ware, and upon receiving such information, he called on said Ware, to know what claim, or title he had to said land; that Ware then exhibited to him a patent for said land, which appeared to be, and which the complainant believed to be, valid on its face, and to have been issued on the proper authority, and Ware then averred, that he was the lawful owner of said land, and denied that complainant had any title, by virtue of his purchase of Robert G. Haden, and threatened to turn complainant out of the possession of the same.

The bill alledges further, that the complainant was deceived by the representations of said Ware, that he was the owner of the land, and by the patent aforesaid, and led to believe that Ware was the owner of said land, and consequently was induced reluctantly to purchase said land again of Ware, for two thousand dollars, for which he executed his three notes for the sum of $666 68 each, due January, 1846, January, 1847, and January, 1848, and thereupon Ware executed to complainant, a bond, conditioned to make him such title as he had, and to assign to complainant the patent aforesaid; that after this, he applied to an attorney to ascertain how he should recover back the money he had paid to said Robert G. Haden; that his attorney applied to the land office, and

discovered that the patent had issued improperly to Ware, and that in fact complainant was the rightful owner of the land, under the purchase from Robert G. Haden; that Ware acquired no title by the issuance of the patent to him; that the patent to him is illegal, and void, and that it should have been issued to Robert G. Haden; that the patent to Ware was issued on the assignment of Alfred Iverson, a pretended attorney in fact of James C. Watson & Co., which was made on the 4th day of May, 1842; but the assignment of Watson & Co., to R. G. Haden, was made on the 30th of July, 1839. The bill charges, that complainant had no means of knowing any thing about the articles of agreement, between Watson & Co., and R. G. Haden, and did not suspect any fraud in the issuance of the patent, until after his purchase from Ware, and until after his attorney had procured the evidence of title from the land office at Washington.

The bill therefore, charges, that the notes were given without consideration, and in consequence of the fraud of Ware, practiced on complainant, and the wrongful issuance of the patent; that the assignment made by Iverson, to Ware, was without consideration; that R. G. Haden had left the State, and is insolvent; that the firm of Watson & Co. is insolvent, and that complainant had demanded said notes of Ware, and offered to deliver up his bond for title; and that Ware knew, that the patent had issued to him wrongfully, and that he had no title. The bill prays that the contract between complainant and Ware be rescinded, and the notes delivered up to complainant. The bill was afterwards amended, by alledging, that at the time of the transfer of Iverson, to Ware, complainant was in possession of the land; that the assignment to Ware, was for the nominal sum of $250, and that at the time it was made by Iverson, he was the attorney of R. G. Haden, and by him employed to procure title to said land; and that the patent was procured by the fraud of Iverson, and Ware, or by Iverson and others.

A supplemental bill was afterwards filed, which referring to, and reiterating the original bill, alledges, that Ware had commenced suit on said notes, by attachment, which had been levied on the property of complainant, and prays an injunction, in addition to the relief sought by the original bill.

Robert J. Ware, the defendant, answered the bill, and amended bill. His answer alledges, that Spier M. Hagerty & Co., of which respondent was a member, purchased the land of the reservee, Cowe Hadjo, previous to 1839, and fully paid for the same; that they filed their claim before the commissioner appointed to examine into the claims, by way of memorial, claiming said land against James C. Watson & Co., which memorial is attached to the answer; that on the filing of said memorial, an agreement was entered into on the 20th day of April, 1839, between Spier M. Hagerty & Co., and James C. Watson & Co., and by the terms of said agreement, which it is alledged is also on file in the land office at Washington City, the two firms of Spier M. Hagerty & Co., and of James C. Watson & Co., became jointly interested in said tract of land. The agreement is attached as an exhibit to the *answer*, and shows that Spier M. Hagerty & Co., claimed by purchase from the Indian reservees, various tracts of land, which were also claimed by Watson & Co., by virtue of a contract entered into between the company, and the chiefs of the Creek tribe, under the directions of Gen. Jesup; that for the purpose of settling said controversy, it was agreed, that said Spier M. Hagerty, and said Watson & Co., should be equally interested in the lands claimed by Spier M. Hagerty & Co., and as to which they had filed memorials before the special commissioner at Washington; and upon the confirmation of the claim of Watson & Co., the lands claimed by Spier M. Hagerty & Co., were to be equally divided between the companies, by allotting one half section to one, and another, to the other company, and the said companies were mutually to relinquish to each other, the portion *allotted to each;* that upon such agreement, the said tract of land described in the bill was allotted to Spier M. Hagerty & Co., and was so certified to the commissioner of Indian affairs; that on the 4th of May, 1842, Alfred Iverson, the agent of the company of Watson & Co., assigned said land to respondent, and requested a patent to be issued to him, and thereupon, the president issued a patent to the respondent, on the 16th day of May, 1845, a copy of which is attached to the answer. The answer also avers, that so far as respondent knew, or

believed, Robert G. Haden had no title to said land, and any claim he may have set up, he believes to be fraudulent. Respondent denies all knowledge of the transfer by Watson & Co., to R. G. Haden, and knows nothing of the contract between R. G. Haden, and complainant; but admits that complainant entered into possession of said land, and made improvements on it. Avers, that respondent has uniformly claimed the land, ever since the purchase by the company of Spier M. Hagerty & Co., from the Indian—Denies that he made any false, or fraudulent representations to complainant respecting his title, or that he has in any manner deceived, or defrauded him; but states, that complainant, in the summer of 1845, inquired of him, if he had a patent for said land, and that he informed him he had, and exhibited it to him for his inspection, and examination; that complainant read it, and then inquired, upon what terms he could purchase the land, and respondent then informed him. Thereupon complainant accepted the terms, and wished to execute the necessary writing, but respondent said to him, that he appeared to be excited; that he did not wish to execute the writings at that time, but advised complainant to go home, and reflect upon it, for ten or twelve days, and if he still wished to make the purchase, he could then do so, and the writings could be executed; that complainant went away, and returned at the expiration of the time, and then gave the notes described, and respondent executed the bond set out in the bill. The answer admits, that respondent said, that Robert G. Haden had no title, and he still thinks he had none, although he claimed to have purchased from the Indian reservee. But his purchase had been declared fraudulent, by commissioners, appointed to examine into the frauds, in the purchase of Indian lands. Respondent believes that complainant made the contract of purchase, with a full knowledge of all the circumstances, and that he knew he was purchasing the title of respondent, and nothing more, and that he did not give for the title more than it was worth. The patent is also set out as an exhibit to the answer, and contains a reservation of the legal, or equitable claim, if any, of any, and all persons claiming under, or through J. C. Watson & Co.

The chancellor, at the hearing, considered the title of Ware to the land, better than that of R. G. Haden, and upon that and other grounds, dismissed the bill, which is now assigned as error.

McLester, for plaintiff in error.

1. The possession of the land by the plaintiff in error from 1839, and his permanent valuable improvements continuously made to the issuance of the patent to the defendant, on the 16th May, 1845, are notice of his title and adverse claim to the whole world, equivalent to the registration of a legal title. His equity need not be recorded, and must prevail against creditors and purchasers. Morgan et al. v. Morgan et al. 3 Stew. 383; Finch v. Earl of Winchelsea, 1 P. Wms. R. 278; Littell's Sel. Cases, 358; Harris et al. v. Carter's adm'rs et al. 3 Stew. 233; Burt v. Cassety et al. 12 Ala. Rep. 734; Scroggins v. McDougald, 8 Ala. Rep. 382.

2. The transfer of the said land made by Alfred Iverson, attorney in fact of James C. Watson & Co., to the defendant, on the 4th of May, 1842, was absolutely void, for the plaintiff had long been, and was then in the adverse possession of the land, claiming under title bond of R. G. Haden, to whom the land had been transferred by Watson & Co. on the 30th of July, 1839; and the patent is void for the same reason. See Dexter & Allen v. Nelson, 6 Ala. Rep. 68; Scroggins v. McDougald, 8 Ala. Rep. 383.

3. If the assignment upon which the patent issued is void, the patent also is void, for the stream cannot rise above its source. Ladiga v. Roland, 2 Howard, 581. The United States had no right to issue the patent to Ware. Reynolds v. McArthur, 2 Peters's R. 417; Jackson *ex dem.* Dickerson v. Stanly, 10 Johns. R. 133.

4. If the patent to defendant is valid, and the United States cannot issue another, then the defendant is a trustee for the plaintiff, for an equitable shall prevail against one having a naked legal title, and he should be forced to convey at his own costs, having wrongfully obtained the title. Morgan et al. v. Morgan et al. 3 Stew. R. 383; Meredith v. Naish, Ib. 207; Burt v. Cassety, 12 Ala. Rep. 734.

5. The complainant purchased the land of the defendant

on the 13th August, 1845, soon after the issuance of the patent, for $2,000, remaining in the possession of the land which he had held from September, 1839—"Having a right to the land, and being ignorant of his own title, equity will compel the vendor to refund the purchase money, with interest, from the time of bringing the bill, although no fraud appear." 2 Sug. on Vendors, marg. page, 44; 1 Vesey, sr. 126; Mosely, 364; 2 Scho. & Lef. 101; 2 Ball & Beat. 171; 1 Story's Eq. 134, § 122; 1 Ves. sr. 400; 2 Ib. 304.

6. It cannot be pretended that this is a compromise of a doubtful, or even bad claim. It is a purchase by the complainant of his own property, at a full price; but if it is a compromise; it was induced by false representation, and was therefore voidable. 10 Ala. R. 305.

J. E. Belser, contra.

1. The title to the land has been adjudicated by the government, and the patent has issued to defendant, reserving on its face the equities of the parties claiming through Jas. C. Watson & Co. This patent cannot be vacated, as attempted by complainant. Jackson v. Hart, 12 Johns. 77; 1 Mun. 135.

2. The law requires reasonable diligence in a purchaser, to ascertain defect of title, but when such defect is brought to his knowledge, no inconvenience will excuse from the utmost scrutiny. 15 Peters, 94; 4 Ohio, 458; 2 Binn, 455.

3. The notes given by complainant to defendant for the land, were fairly and intelligently given in the settlement of a claim backed by a patent. The defendant, in his answer, denies ever making any fraudulent representations on his part in the case, and there is no proof adduced by complainant tending to establish this part of his bill. Again, defendant's bond, executed to complainant, shows that the latter well knew what he was purchasing, and the testimony of the witness Blakey proves that the land was purchased by complainant after deliberation and inquiry. The contract will be upheld, without reference to complainant's previous title or previous possession. 8 Metc. 403; 3 Hill, 504; 1 Stew. 532; 9 Cranch, 98; 5 Wheaton, 304; 4 Ohio, 459; 2 Binn, 455.

4. The evidence of R. G. Haden is inadmissible on the ground of his interest: it is objected to for this cause in the record. That of Abbott and Ryan, objected to by complainant, is immaterial; the record from the government office is proved, independent of their testimony. Their proof as to their agency, &c. is however good, and this, coupled with the record, is sufficient. The complainant did not purchase of R. G. Haden until 25th September, 1839.

DARGAN, J.—The proof altogether fails to establish, that the defendant in error practised any fraud or imposition on the plaintiff, in the execution of the contract. But it is contended, that the complainant is entitled to relief on the ground of mistake; that at the time of entering into the contract, he had the title to the land, and he made the purchase in ignorance of his rights, and by the contract he acquired no title, nor did Ware, the defendant, part with any. On this ground it is contended, that equity ought to relieve him. It therefore becomes necessary to examine if there was a mistake, and if there was, is it of such a character as entitles the complainant to relief.

The material facts on which the title, or claim of the parties to the land in dispute depend, are as follows: The complainant claims the land by a contract made with Robert G. Haden, who claimed to have purchased of the Indian, for whom it was reserved under the treaty of 24th March, 1832. But this contract of R. G. Haden has not been approved by the president. Spier Hagerty & Co. of which firm the defendant was a member, also claimed to have purchased the same land from the Indian, but this contract also had never received the approval of the president. J. C. Watson & Co. also claimed the land, by a contract entered into with the chief of the tribe, and their contract was ratified and approved by the president. Before this however was done, R. G. Haden and Watson & Co. having conflicting claims to different tracts of land, bought from the Indians, entered into an agreement by which these claims were to be settled, and by this agreement, the land in dispute was to be assigned to R. G. Haden. This agreement bears date the 3d day of July, 1839. Spier Hagerty & Co. also claimed various tracts of

land which were claimed by Watson & Co., and they had filed memorials before the commissioner appointed to examine into the conflicting titles derived from the Indians, against the claims of J. C. Watson & Co. On the 20th May, 1839, the two firms of Watson & Co. and Spier Hagerty & Co. entered into an agreement, by which opposition to the claims of Watson & Co. was withdrawn, and the lands claimed by both the firms were to be equally divided between them, by half sections; and the answer alledges, that under this agreement, the land in dispute was allotted to Spier Hagerty & Co., and was so certified to the commissioner of Indian affairs. On the 4th day of May, 1842, the agent of the company of J. C. Watson & Co. assigned the land to the respondent, and requested the patent to be issued to him, which was done in 1845. But the patent, on its face, reserves all title, whether legal or equitable, in favor of any other person, derived from Watson & Co. From the evidence it appears, that Iverson, as the agent of Watson & Co. assigned the land to Ware, and requested the patent to issue to him. It also appears, that Robert G. Haden, and the complainant, had employed Iverson to represent the claim of complainant, and to procure for him a patent. After the patent had issued to Ware, the complainant called on him, to inquire if it had been issued to him, and being informed that the patent had been issued to the defendant, he inquired whether the defendant would sell the land; Ware answered in the affirmative; stated to him the terms on which he would sell, and then showed him the patent; which was examined by the complainant; but the defendant declined then to consummate the contract, because the complainant seemed to be excited; but requested him to take time to reflect on it, and if he still desired to make the trade, after ten or twelve days deliberation, that he would consummate it. The answer also admits, that in this conversation, he expressed the opinion, that R. G. Haden had no title, and still insists that he had not. At the expiration of ten or twelve days, the complainant returned, and still desiring to make the trade, it was consummated. These are the material facts on which the title of the parties to the land in dispute depends, and the circumstances under which the contract sought to be rescinded was entered into.

We think it very clear, that the legal title to the land passed to Ware, by the patent. By the treaty, the ultimate fee in the land reserved for the Indians, remained in the government; and the purchaser from an Indian reservee acquired no title by his purchase, until the contract was approved by the president; when this was done, the purchaser became entitled to a patent, which, when issued, carried the fee to the patentee. 5 Porter, 161; Ib. 413.

As neither the contract af Haden, or of Spier Hagerty & Co. was approved by the President, neither of them gave, within themselves, any right or title to the land. The contract of J. C. Watson & Co. was approved of, and they became entitled to a patent, and could have it issued to themselves, or could direct that it be issued to another; and a patent issued on this contract, which had received the sanction of the president, carried with it the legal title.

It is true, that a patent for land issued without authority of law, is void; or if the government has no right or title of any description, to the thing granted, the patent is a nullity, and confers no right or title whatever on the patentee.

But this is not the condition of the patent in the present case. The president had authority, and it became his duty to issue patents to such persons as purchased the Indian reservations, after the contract had been approved by him; and a patent thus issued, carries with it the highest evidence of legal title.

In reference to the land in dispute, the title was in the government, and the president was authorized to issue a patent to Watson & Co. A patent was issued under their authority to Ware, and it vested in him the legal title. There was then no mistake in regard to the legal title. The patent, however, reserves the title of all others, whether *legal* or *equitable*, derived from Watson & Co., and if the complainant had the superior equitable title, a court of equity would subject the legal title to it; and probably would do so, even if there had been no express reservation of title on the face of the patent. If then there was a mistake at all, it was in reference to the equitable, not the legal title to the land. But if we should arrive at the conclusion, that there was a

mistake, and that before the contract was entered into, the complainant had the superior equitable title, we should be met with the question, whether a court of equity, under the circumstances of this case, could afford relief on the ground of mistake alone?

I admit, that if one wholly ignorant of his title, and asserting no claim to land, purchases it of another, and afterwards discovers that he had the title before his purchase, and that his vendor had none, a court of equity would afford relief, and decree the vendor to refund the purchase money. 1 Sugden on Vend. 253-4. But the foundation of relief in such a case is, that the party acted in ignorance of the facts. When all the facts constituting the title of the complainant are known to him, and he purchases the land, or compromises a controversy in reference to it, and acts on the presumption that he has no title, then the mistake is one of law, and not of fact.

If there was a mistake made by the complainant, it was a mistake of law, for we are satisfied that each party knew the facts on which his own title, or claim, depended. The patent which reserves the title of all persons, whether legal or equitable, was examined by the complainant; he then took time to deliberate on the propriety of the contract, and deliberately entered into it, against a mistake of law; under such circumstances equity cannot afford relief.

There are cases to be found, which hold that equity can grant relief against a plain and palpable mistake of law.—Bingham v. Bingham, 1 Vesey, 126; Lansdown v. Lansdown, Mosely, 364; 2 Sch. & Lef. 101; 2 Ball. & Beat. 171. But I think, on a strict examination of the cases, it will be found, that the mistake was so gross, and palpable, as to superinduce the belief, that some undue advantage was taken of the party, owing either to his imbecility of mind, or the exercise of improper influence. When the evidence is sufficient to induce that belief, then a court of equity ought to interfere. 1 Story Eq. 138, 140. And whether there may not be cases of such gross mistake as to afford evidence within themselves of undue advantage, against which equity will relieve, it is not necessary to decide; for if there was a mistake as to the legal rights of the parties in this case, it

was made with a full knowledge of all the facts, after due deliberation, without any persuasion on the part of the defendant, or any effort on his part to induce the complainant to enter into it. Both parties asserted title to the land, and by the contract, the legal, if not the equitable title passed to the complainant. Under such circumstances, a mistake of law alone cannot give a title to relief. See 18 Wend. 407; 6 Paige, 189; 1 John. Ch. R. 512. Let the decree be affirmed.

CHILTON, J., not sitting.

SNODGRASS v. CABINESS, ASSIGNEE, &c.

1. A regular grant of administration *eo instanti* invests the administrator with the personal assets of the intestate; and they are not subject to seizure and sale under an execution issued on a judgment rendered against the intestate, after his death, notwithstanding the administrator may have converted or fraudulently disposed of them.
2. If C. and H. combine to perpetrate a fraud on the creditors of an estate at a sale by the administrator of the property thereof, and C. *alone* becomes the purchaser, and H. *afterwards* acquires possession of the property under a contract with C. the *mere possession* of it, by H. or those claiming under him, will not, of itself, give them the right to retain it as against C. or his assignee.

Error to the Circuit Court of Madison, before the Hon. G. D. Shortridge.

THIS was an action of detinue, instituted by Stephen Carter, and subsequently revived in the name of defendant in error, his assignee in bankruptcy, against the plaintiff in error, to recover the possession of two slaves, with damages for their detention. It appeared by a bill of exceptions in the record, that the slaves in question were once the property of

one George Swink, who died on the 15th March, 1838, and that said Carter purchased them at a regular sale made by the administrator on said Swink's estate, on the 22d February, 1839; that after the death of said Swink, the Branch Bank at Decatur recovered judgment against him, McNairy Harris, et als, as partners, under the style of Geo. Swink & Co.; that execution issued on said judgment, was levied on said slaves, after said administrator's sale, and that the slaves were purchased at a sale by the sheriff, under said levy, by the said bank, and that plaintiff in error subsequently purchased them from said bank. It further appears, that after the administrator's sale, and purchase by Carter, the slaves were left in the possession of said Harris, under an arrangement between him and Carter, and that he ran off with them to the State of Tennessee, &c. The bill of exceptions also discloses numerous facts tending to show a fraudulent combination between said administrator, Carter, and Harris, at said administrator's sale, as well as other facts, conducing to show, that Harris, by an arrangement with Carter, had acquired a right to the slaves, &c.

The court charged the jury, that if they believed from the evidence, that the negroes sued for were the individual property of Geo. Swink, at the time of his death, the defendant could not urge fraud in the purchase of them at said administrator's sale, to impeach the validity of said sale, unless they should also believe from the evidence, that the bank was at the time of said sale, an execution creditor of said Swink.

The defendant's counsel asked the court to charge the jury, that if they believed said administrator's sale, and the purchase thereat, were fraudulent, or brought about by a fraudulent combination between Carter and Harris, Harris having the possession of the slaves, was in a better condition than Carter, and under such circumstances Carter could not recover them from Harris, or any one claiming under him, which charge the court refused to give, as asked, but qualified it by adding, that the charge was perhaps correct as an abstract proposition, but that defendant could not be heard to alledge fraud in the sale, unless the bank was an execution creditor of Geo. Swink. To the charges given, and the re-

fusal to give the charge asked, the defendant excepted, and now assigns them as error.

Clay & Clay for plaintiff in error.

The action was brought after the delay of —— years by Carter. S. D. Cabiness, the defendant in error, takes his place as assignee in bankruptcy, merely; consequently it is a question between Carter and the creditors of Harris. Then if Carter lent himself to the fraudulent purposes of Harris; if, as he admits upon his oath, he consented to become the secret purchaser, and intended to let Harris have the possession and benefit of the property—if, as is apparent, he assented to or acquiesced in the removal of the property by Harris, he is a party to the fraud of Harris, and cannot rightfully recover, to the prejudice of Harris's creditors, who had judgment and execution against him. Indeed, the case may be put more strongly for the plaintiff in error, for if Carter, by way of assisting Harris to defeat or defraud his creditors, placed property in Harris's possession, and suffered him to remove it, and were now attempting to recover the property of Harris, he could not sustain his claim, because he was a participator in Harris's fraud—and it is a legal axiom, founded in good sense and public policy, that *in pari delicto, melior est conditio possidentis.* In other words, if two men conspire, or combine to effectuate a fraudulent purpose, and to carry out such fraudulent purpose, one places his own property in possession of the other, the law will not interfere between them —it leaves the property in the hands of him who happens to be in possession. "A party to the fraud shall not be relieved"—even in chancery. 2 Com. Dig. tit. Chancery, 3 M. 7, top p. 617, bottom 644, 1st Am. from 5th Lond. ed.; 2 Vern. 602; Ib. 71; 2 Ves. 375.

In cases of illegal contracts, or those in which one party has placed property in the hands of another for illegal purposes, if the latter refuses to account for the proceeds, and fraudulently or unjustly withholds them, the former must abide by his loss, for *in pari delicto, melior est conditio possidentis,*" &c. 1 Kin. L. Com. 398-9; Holman v. Johnston, Cowper's Rep. 341; Armstrong v. Toler, 11 Wheat. R. 258; Hannay v. Eve, 3 Cranch R. 242; Dana's Abr. ch. 226, art.

18; Smith v. Bromby, Douglass R. 696, note; 1 Story's Com. on Eq. Jur. 69, 70, and note 1, on p. 70; Boyd v. Barclay, 1 Ala. 34.

The circuit court erred in its charge to the jury, as it would seem, under a misapprehension of the facts. He seems throughout to suppose that George Swink, deceased, or his representatives, were parties to the case, or that his property was to be affected by the result. So far from that idea being well founded, the administrator of Geo. Swink had sold and parted with the property in controversy. It had gone into the possession of Harris, under a fraudulent arrangement between him and Carter—and the question was, not as to the supposed fraud of Geo. Swink, as to whom we were considered creditors at large, but as to the fraudulent conduct of Harris, (as to whom we were judgment and execution creditors,) and his copartner in the fraud, Stephen Carter.

S. Parsons, contra.

The suit was brought, and the judgment recovered after Geo. Swink's death, although the writ was returned executed as to him and the other defendants, who were his partners. Under the *fi. fa.* from that judgment, Geo. Swink's private property was sold, and that is the title under which Snodgrass claims.

The judgment and execution as to Geo. Swink were void. Hood and Stinnett v. Mobile Branch Bank, 9 Ala. 335. And there are other authorities tending strongly to sustain the above. Buchanan v. Rucker, 9 East, 191; Puckett v. Pope, 3 Ala. 554; 13 Wend. 407; 5 J. R. 40; 5 Day's Rep. 527; 15 J. R. 143.

Cabiness claims as assignee of Carter, a bankrupt. It was urged on the trial below, that the sale of Geo. Swink's administrator to Carter was fraudulent. But the bank, if a creditor of Geo. Swink at all, was only a creditor at large, its judgment and execution being void. And a creditor at large cannot contest such a title on the ground of fraud. Gilpin v. Davis, 2 Bibb's Rep. 416; 3 Lit. 14; 4 Monroe, 122; Dunklin v. Wilkins et al. 5 Ala. 199; Wintingham v. Wintingham,

20 J. R. 296; Henry v. Graham, 7 Dev. & Bat. 76; Osborne v. Moss, 7 J. R. 161.

But the bank did not prove that it was even a creditor at large of Geo. Swink, because its judgment and execution were no proof as to him, and there was no other. For this reason the bank had no right to have any charges whatever from the court, or to except to any. It was not in a situation to be injured by any charge, or for the want of any.

COLLIER, C. J.—The first charge assumes, that if the slaves were the individual property of George Swink, to entitle the defendant to set up fraud in the sale by the administrator, it was necessary for him to show that the branch bank at Decatur was an execution creditor of Swink, or of one of the mercantile firms of which he was a partner. Conceding that it is not competent for a stranger to gainsay a judgment against a dead man until it is vacated or annulled by a direct proceeding, and still we think that such judgment must be inoperative as against his estate, which has passed to an administrator. The regular grant of administration *eo instanti* invests the personal representative with the assets of the deceased; and they are not subject to seizure and sale under an execution issued on a judgment thereafter rendered against the intestate. This principle of law does not become inapplicable, by proof that the administrator has converted, or fraudulently disposed of the assets committed to him. For mal-administration, he and his sureties incur a personal liability, and there is doubtless some course of procedure, by which, if need be, the misappropriated assets may be reached and devoted by creditors, to the payment of debts. There is then no error in instructing the jury, that the Decatur Bank should have been a creditor of Swink, by execution, when the slaves in question were sold by his administrator, to enable the plaintiff to avail himself of the alledged fraud. The sale by the bank was under an execution issued on a judgment rendered against Swink after his death, and after his administrator had taken possession of, and sold the slaves. Now, although the administrator's sale may have been fraudulent, yet if the bank had no lien by an execution at that time, it could not sell the slaves under its

judgment, obtained after Swink's death, when the administrator's title had vested; and consequently the defendant, who is the vendee of the bank, is not in a condition to alledge the fraud.

2. Conceding that the sale by the administrator, and purchase by Carter were fraudulent, and that Harris and Carter combined in the commission of the fraud, yet the mere fact of Harris being in possession, would not give him a legal right to hold the slaves as against Carter, who was the purchaser from the administrator. If Carter and Harris had been joint purchasers, and had both combined with the administrator to perpetrate a fraud, and in pursuance of such combination and joint purchase, Harris had taken possession of the slaves, the principle invoked by the prayer for instructions, would perhaps have been applicable. But the charge of the court is not asked upon this hypothesis. It assumes that if there was a fraudulent combination between Carter and Harris to purchase, although Carter may have purchased individually, their fraudulent scheme, which was a matter of joint arrangement, would subject the slaves to the payment Harris's debts, or that Carter could not have asserted a title against him. The maxim *in pari, delicto melior est conditio possidentis*, is certainly a salutary one, but will not admit of such illimitable tension.

In Armstrong v. Toler, 11 Wheat. Rep. 258, it was decided, that where a contract grows immediately out of, and is connected with an illegal or immoral act, a court of justice will not lend its aid to enforce it. So if the contract be in part only connected with the illegal consideration, and growing immediately out of it, though it be in fact a new contract, it is equally tainted by it. But if the promise be entirely disconnected with the illegal act, and is founded on a new consideration, it is not affected by the act, although it was known to the party to whom the promise was made, and although he was the contriver and conductor of the illegal act. To the same effect is the opinion delivered by me in Carrington v. Caller, 2 Stew. 175, which, by the division among the judges who participated in the decision, must be regarded as the law of that case.

The prayor for instructions forestalls the inquiries of the

jury upon the point, whether Harris did not hold the slaves under a subsequent contract with Carter, although there is proof in the record tending to show that such was the fact. If this contract was not simulated, but entered into in good faith, there can be no doubt but Carter's title is paramount to Harris's, though there may have been a fraudulent combination between them, which led to the purchase from the administrator. Upon this contract Carter could have recovered without proving his own purchase, by showing Harris's recognition of his title, and undertaking to deliver to him the slaves—all which is abundantly manifest from its terms. He would require no aid from the illegal purchase, and this may be regarded as a fair test of his right to recover.

3. The second charge, or as it is inappropriately called a qualification, of the prayer for instructions, is a substantial reiteration of the first charge, and is consequently unexceptionable. We have but to add, that the judgment of the circuit court is affirmed.

THOMPSON v. MERRIMAN.

1. The landlord may maintain assumpsit against the sheriff, for money had and received, for rent due from the tenant at the time of the levy of an execution.
2. The sheriff cannot set up, in bar of the action, or by way of off-set, a debt due from the landlord to the tenant.

Error to the Circuit Court of Sumter. Before the Hon. G. Goldthwaite.

Assumpsit by the defendant in error. The defendant in error leased a store house, to Philip Farris, who occupied it as such. The plaintiff in error, as sheriff, levied an execution on the goods, and sold them, the tenant being indebted

to the defendant in error for a year's rent. The sheriff had notice of the claim for the rent in arrears, and has retained this amount in his hands. To recover this, assumpsit is brought by the defendant. The sheriff resists the recovery, on the ground, that assumpsit for money had and received will not lie; and also offered to prove, that the plaintiff below, (defendant in this court,) was indebted to the defendant in execution, Philip Farris, more than the amount of rent due from him to her. The court decided, that the action could be maintained, and excluded the evidence tending to show, that the plaintiff was indebted to the tenant.

The ruling of the court is here assigned as error.

R. H. Smith, for plaintiff in error.
Bliss & Baldwin, contra.

DARGAN, J.—It has been repeatedly held by this court, that the act of 1807, (Clay's Dig. 210,) which prohibits the taking of any goods, and chattels, by virtue of any execution against the tenant, from off the demised premises, unless the plaintiff in execution will pay, or tender to the landlord as much as one year's rent, if so much be due, and in arrears, gives the landlord a lien on the goods of the tenant. Denham & Wafford v. Harris, 13 Ala. 465; Whidden v. Toulmin, 6 Ala. 104; Thompson v. Spinks, 12 Ala. 155; Dulany v. Dickerson, Ib. 601. But being a mere lien, it gives to the landlord no title to the goods upon which he can maintain trover, detinue, or trespass, if they be taken from the defendant's possession, or be sold or removed by him.

The plaintiff, therefore, although she gave notice to the sheriff of her demand for rent, could not bring either of those actions, because she had no title to the goods. She certainly, however, had the right to have her demand for rent satisfied before they were removed; but as this right was not regarded by the sheriff, the question arises, what remedy has she to enforce it? In the case of Denham & Wafford v. Harris, before referred to, the landlord filed a petition, in the circuit court, praying that the sheriff might be ordered to pay to him the rent in arrears, out of the money received on the sale of the goods. The prayer of the petition was allowed.

It is true, that the question as to the remedy, in that case, was not made by the counsel, nor noticed by the court; but we find that other courts on similar statutes, have entertained a similar practice. In 18 Johnson, 1, a sheriff levied on the goods of a tenant, and sold them under execution; the landlord moved the court to have his rent satisfied from money arising from the sale. The motion was granted. The same remedy was allowed in the case of Beckman v. Lansing, 3 Wendell, 444.

In Haskins v. Knight, 1 M. & S. 245, the landlord obtained a rule against the plaintiff in execution, to show cause, why the sheriff should not pay to him the rent in arrears, out of the proceeds of the sale of the tenant's goods, seized by the sheriff on the premises; and it being shown, that at the time of the levy, there was rent due the landlord, the rule was made absolute, and the sheriff ordered to pay it.

These decisions, made upon statutes similar to ours, show, that the landlord is entitled to receive from the sheriff, out of the proceeds of the goods in his hands, the rent due him from the tenant at the time of the levy; and it must follow, that if the landlord is entitled to be paid one year's rent out of this fund, by an application to the court, the sheriff who has it in his possession, must have money which belongs to the landlord, and therefore he has money for his use.

But it is objected, that there is no privity of contract between the sheriff and the landlord. The only privity that need be shown in this action, is, that which is implied by law, from the fact, that the defendant has money in his hands, which belongs to the plaintiff. 15 Cow. 52; 17 Mass. 563; Ib. 579; 5 Cow. 71.

It is supposed, however, that the case of Dulany v. Dickerson, 12 Ala. 601, is opposed to the view here taken. But the facts of that case, differ widely from the facts in the cause before us. There, the tenant had sold the goods to a stranger, and he had obtained possession of them. The goods remained in specie, in the hands of the vendee, and it is very clear to my mind, that he could not be said to have money for the use of the landlord. The vendee of the tenant, retaining the possession of the goods, bore perhaps the same relation to the landlord, that the vendee of the sheriff

does, if both had notice of the lien, but neither of them could be considered, from having the goods in possession, as having money for the use of the landlord.

2. We think also, that the court correctly rejected the evidence offered by the sheriff, tending to prove, that the plaintiff was indebted to the tenant, for goods sold and money lent. If these debts could be asserted by the sheriff, in bar of this action, of course they must be considered as compensated, or extinguished in the hands of the tenant, although they might not even be allowed by the jury. For if they can be legally given in evidence to defeat this action, and in fact have been, the tenant could not sue on them afterwards; and to permit the sheriff to defend himself by giving these debts in evidence, would be to bind the rights of one not a party to the record.

The authorities relied on by the plaintiff in error, do hold, that a surety when sued, may, with the consent of the principal, prove by way of set-off, a debt due from the plaintiff to the principal. These decisions extend the doctrine of equitable defences as far as we can go, yet they do not warrant the sheriff, in defending himself, by proving that the landlord was indebted to the tenant. The plaintiff in error is neither the security of the tenant, nor does he assert these counter claims with his consent.

We can perceive no error in the ruling of the court, and the judgment must be affirmed.

POLLARD ET AL, TRUSTEES, &c. v. MERRILL & EXIMER

1. To create a separate estate in a married woman, a clear and manifest intention must appear, on the face of the instrument, to exclude the marital rights of the husband.
2. The intervention of a trustee, in cases, where by the terms of the instrument, *the marital rights* of the husband are not excluded, and he is allowed

the use and enjoyment of the property, will not convert his estate therein, into a mere equity.

3. A provision, in a marriage contract which does not create a separate estate in the wife, in restraint of the husband's right to alienate the personal property therein embraced, is void.

4. A marriage contract by which the personal property of the intended wife is conveyed to trustees, to have and to hold, "*for the separate and exclusive use, benefit and maintenance,*" *of her and her husband*, "*during their joint lives*, in no wise liable, or subject to him," the said husband, "or to the payment of any of his debts, or liabilities now, or hereafter existing," does not create a separate estate in the wife, but vests such an estate in the husband, as, when reduced to possession, is liable to execution at law.

Error to the Circuit Court of Montgomery. Before the Hon. J. D. Phelan.

This was a trial of the right of property in certain slaves, and horses, levied on under an execution in favor of defendants, and claimed by plaintiffs in error, as the trustees of Mrs. Sarah Ann Pollard, wife of Wm. H. Pollard, the defendant in execution. The cause was submitted to a jury, who found a special verdict as follows: "They find that the negroes and horses levied on were on the plantation on which the defendant in execution lived, and were under his control and management, and have been since his marriage; that the said negroes and horses are the same named and described in the deed of marriage contract hereto appended and copied; that the marriage contemplated and named in said contract took place shortly after the execution of said contract, or deed; that said marriage contract, or deed, was executed at the time it bears date, and before the marriage, and is in the following words:" (Here follows a copy of the marriage contract, the material parts of which are sufficiently set out in the opinion of the court, for a full understanding of the question it presents.) After assessing the separate value of the negroes and horses, the jury say further, "that if, upon these facts, the law is with the plaintiffs, they find for the plaintiffs; if on the contrary, it is with the claimants, then they find for the claimants."

The court thereupon rendered judgment for the plaintiffs in the execution, which is now assigned as error.

John A. Elmore, for plaintiff in error.

Under the deed to claimants, what is the interest taken by Wm. H. Pollard, and is it such, or in such condition, that it can be sold under execution at law, or must the creditor resort to a court of chancery to separate it? We insist that this deed is materially variant from those referred to by counsel for claimants. In Cook v. Kennerly and Smith, the trust was to the use of the wife and husband. In Bender v. Reynolds, to and for the joint and equal use, benefit and behoof of wife and husband. In Easly v. Moss, that the trustees should pay to the husband the profits, &c. for the joint maintenance of himself and wife. In none of these cases is the dominion of the husband excluded, but in the declaration of the uses, it is in fact asserted. Much stress is laid by the court, on the use of the term *joint* in the latter case; and if such force is given to this expression, we ask that the same effect be given to the terms *separate* and *exclusive*, when used in the same place and manner, as denoting the interest of the wife, and dominion of the husband. We admit that Pollard, the husband, takes under this deed, an interest that can be subjected for his debts, but not at law. And the first question is, does he take the entire beneficial interest in the property, or is there any portion vested for the use or maintenance of the wife, over which he has no control. We look to the whole of the deed to ascertain this, if in the declaration of the uses there is any ambiguity. "To the separate and exclusive use, &c., and maintenance of wife and husband." Does this mean joint use and maintenance, or sole use and maintenance of the husband?—if either is so plain from the words themselves, then the wife's interest is excluded, and the husband's dominion asserted. But we insist that the terms are not ambiguous, but clearly give to the wife a separate and exclusive interest from her husband, for her use, benefit and maintenance, and although the extent of this interest is not declared clearly, this will not deprive her of it. The plain and obvious meaning is, that the property is conveyed in trust for the separate and exclusive use, benefit and maintenance of the wife, not subject to the debts or control of the husband, and a use is also given to the husband. Can the interest given in this manner to the wife be taken

from her. The construction of the deed is, that they take equal interests in the property, the interest of the wife to her separate use and maintenance, or that she takes an interest sufficient for her maintenance—and if either, then the trust is fastened on each portion of the property, and a sale of any part under execution, would destroy the trust. It is clear that the deed could have been drawn giving such an interest to the wife, and the rest of the use to the husband. Has it done so in this case? The rest of the deed confirms this view. The whole tenor of it shows this intention to secure a part of it to the wife, and excluding the dominion of the husband from her portion.

N. Harris, Watts and Jackson, for the defendants.

1. It is an incident of the ownership of property, that it shall be subject to the payment of the debts of the owner, either at law, or by a proceeding in equity.

2. To exclude the marital rights in the property of a married woman, a clear intention, that it shall be to her separate use, must appear in the declaration of use. Lumb v. Milnes, 5 Ves. 517; 2 Story's Eq. § 1381-2; Hoskis v. Coalter, 2 P. 463; Lamb v. Wragg & Stewart, 8 Ib. 73; The Bank v. Wilkins, 7 Ala. 418; O'Neil v. Teague, 8 Ib. 345.

3. No such intention is shown by the deed in the case at bar.

4. It is an inseparable incident of a separate estate in the wife, that the husband has no interest in, or control, or dominion over it. Cook v. Kennerly & Smith, and Moss v. McCall, and Bender v. Reynolds, 12 Ala. 46, 446, and 630, and cases there cited.

5. It will appear by an examination of the deed in question, that it gives the husband an interest in, and control and dominion over the property.

6. The chattel interests of the wife, when reduced to the possession of the husband, are his property. There can be no partnership, or community of goods between husband and wife; they cannot hold as joint tenants, or as tenants in common. 2 Black. Com. 182; Barber v. Harris, 15 Wend. 617; Bender v. Reynolds, *supra*.

7. When an interest in property is given collectively to a married woman and her children, the interest acquired by the husband, in virtue of his marital right, can only be reached in equity, where the respective interests of the wife and children can be ascertained and separated. Fellowes v. Tann, 9 Ala. 1002; Spears v. Walkley, 10 Ib. 328; Rugely & Harrison v. Robinson, 10 Ib. 702.

8. When the husband has a beneficial interest, coupled with the possession of the property, his own life estate, and the life estate of the wife, so far as the latter is reduced to possession, may be sold to pay his debts, under execution against him at law. Cook v. Kennerly & Smith, Bender v. Reynolds, and Moss v. McCall, *supra*, and authorities there cited.

CHILTON, J.—According to the settled law, as recognized by numerous decisions of this and other courts, the facts set forth in the special verdict of the jury, fully sustain the judgment thereupon pronounced by the court, as we will briefly proceed to show.

In Cook v. Kennerly, 12 Ala. Rep. 42, 46, it is said, "it is an inseparable incident to a separate estate in the wife, that the husband has no control or dominion over it;" and the cases all agree, that while no particular form of words is necessary to the creation of a separate estate, yet there must appear upon the face of the instrument, a clear and manifest intention to exclude the marital rights of the husband. Lamb v. Wragg and Stewart, 8 Porter, 73; Dunn and Wife v. The Bank of Mobile, 2 Ala. 152; Inge v. Forrester, 6 Ib. 418; Bank v. Wilkins, 7 Ib. 589; O'Neal v. Teague, 8 Ib. 345; Anderson v. Hooks, 11 Ib. 954; Cook v. Kennerly, *supra;* Bender v. Reynolds, 12 Ib. 446; Spear v. Walkley, 10 Ala. 328; Moss v. McCall, 12 Ib. 630; Hale v. Stone, at the last term, and Machen v. Machen; also, Lenoir v. Rainey at the present term. See also, Clancy's H. & W. 262.

A trust for the separate use of the wife may be declared, either in express terms, or it may be inferred from the manner in which the property is to be enjoyed, or the directions given concerning its management. Hill on Trustees, 420. But in either case the "intention must be clearly and une-

quivocally expressed," to create a separate estate, in order to exclude the husband. It is said by the same authority, that in modern times the judges have required much more stringent expressions for this purpose than were once considered sufficient. So in Tyler v. Lake, 2 Russ. & Mylne, 189, Lord Brougham said, the language used should leave no doubt of the intention, and must be such as to forbid the court to speculate on what the probable object of the donor might have been. See also, Blacklaw v. Laws, 2 Hare, 49; Thompson v. McKissick, 3 Hum. 631. "The purpose," says Judge Story, "must clearly appear, beyond any reasonable doubt; otherwise, the husband will retain his ordinary legal, marital rights over it." Story's Eq. 1381; 2 Roper Leg. 370; 19 Ves. 416; 4 Madd. 419.

The decisions from our own court, already cited, fully sustain the position that the intervention of a trustee, in cases where the marital rights of the husband are not excluded by the terms of the deed, and where the property itself, (being personal,) is to be used and enjoyed by him, does not have the effect to change his estate into a mere equity, which can only be made subject to his debts by a resort to chancery. Such were the decisions in Carleton & Co. v. Banks, 7 Ala. Rep. 32; Cook v. Kennerly, Bender v. Reynolds, Moss v. McCall, and Hale v. Stone, *supra;* also, Lenoir v. Rainey, at this term.

Again: it is a well settled principle, that a restraint upon the alienation of personal property, except in the case of a separate estate in a married woman, is void. See the cases above cited, and Brandon v. Robeson, 18 Ves. 429. So that, unless by the terms of the deed, the husband is excluded by the creation of a separate estate in the wife, the property must be subject to his debts, notwithstanding the provision in the deed expressly to the contrary.

It is further a canon of the common law, that there can be no partnership or community of goods between husband and wife. Her personal chattels vest absolutely in him, and if a conveyance of real estate be made to them jointly, they are said to be seized *per tout*, and not *per my*,—that is, each is seized of the whole, and if one die, the survivor takes the entirety. 2 Black. Com. 182; 8 Cow. 277; 19 Wend. 617; 12

Ala. Rep. 48; 7 Yerg. 319; Co. Lit. 187, b.; 16 Johns. R. 115; 5 Johns. C. Rep. 427; 5 Mass. 521; 3 Randolph, 179. "They take but one estate, as a corporation would take, being by the common law deemed but one person, and the estate continues in the survivor the same as if one of the corporators were to die." Saul v. Campbell, 7 Yerg. Rep. 319; 5 T. R. 652; 1 Dana, 37; Ib. 243; 2 Kent's Com. 132; 4 Ib. 362.

Applying the principles thus hastily educed to the facts as found by the special verdict of the jury, we are bound to declare that the deed in question does not vest in Mrs. Pollard a separate estate, but on the contrary, vests the property in William H. Pollard, the husband. It is true, that in the reciting part of the agreement, it is said to be made, "that all the property above named, with the future increase and additions, should be secured to the use and exclusive benefit of the intended wife;" but how was this object to be effected? The agreement gives the answer, by following the declaration of this intent with the words, "*in the manner hereinafter mentioned.*" It then proceeds to convey the property to John C. Webb and Charles T. Pollard, "to have and to hold the same upon the trust, and to the intent and purposes hereinafter expressed, viz: *for the separate and exclusive use, benefit and maintenance of the said Sarah Ann Webb and the said William H. Pollard, during their joint lives*, in no wise liable, or subject to him, the said William H. Pollard, or to the payment of any of his debts or liabilities, now or hereafter existing." It is then provided that if the said Pollard should die, the wife surviving, she should hold for life, and at her death, the same shall vest in, and descend to, the issue of said Sarah Ann and William H., but in default of issue at the death of said William, the property is to vest absolutely in the wife. In the event of the death of the wife, the property is to vest in the husband, under the same limitations as are above stated in respect to the wife. Now, it would be a contradiction in terms, to say that the wife can take a *separate* estate under a deed which conveys to *her and her husband a joint estate.* If she has a separate estate in the property, then the husband must be entirely excluded; but the declaration of trust expressly provides that he shall

participate equally with the wife, in the use and benefit of the property; and they are both placed upon precisely the same footing, as respects the survivorship and the ultimate fee.

It is most manifest, then, that the intention was, not the exclusion of the husband from the benefit of the estate, but to place the property in a condition in which it would not be liable for the husband's debts, nor subject to be sold by him. We speak of the intention, only so far as we can arrive at it from an analysis of the whole instrument. The substance of the whole deed is, that the legal title shall vest in the trustees, but the *joint* use of the property in the husband and wife, during their lives, and to the survivor for life, in the event of issue, and in default of issue, to the survivor in fee —exempting the property from the husband's debts, and restraining its alienation, except under certain restrictions therein prescribed.

Had the use been declared in favor of the intended wife, even in the absence of words excluding the husband in that clause of the deed, we should hold that the other portions of the instrument would constitute a sufficient indication of an intention to exclude him from any control or dominion over the property; but being to husband and wife *jointly*, we must either deprive the husband of all benefit under the deed, or give him the entire life estate. They cannot take moieties, but at law the wife's interest vests absolutely in the husband.

This case must not be confounded with that class of cases, where property is given to be enjoyed by the husband and his wife and children, or for the support and maintenance of the wife and children; for although the husband may in such cases acquire a right to, or interest in the property, which can be subjected to his debts if capable of separation, yet the creditor must resort to a court of chancery to separate such interest. In cases of that character, the law will not permit the trust to be defeated in respect to third persons, by a sale of the property under execution. Such were the cases of Fellows et al. v. Tann, 9 Ala. Rep. 1002; Spears v. Walkley, 10 Ib. 328; Rugely & Harrison v. Robinson, Ib. 702; Jasper & Maclin v. Howard, trustee, 12 Ala. Rep. 652;

and Lavender et al. v. Lee, 14 Ala. Rep. 688. In the case before us, the husband and wife are the sole beneficiaries; the use is vested in them for life. The property is placed in possession of the husband, whose marital rights not being excluded, immediately attach, and all the interest of the wife vests in him for his life. There is no interest then, to be separated from his, and therefore no necessity for a resort to a court of equity.

Whether if the deed, through a mistake of the scrivener, fails to speak the true intention and meaning of the parties, it may not be reformed in a court of chancery, we need not now inquire, as the question does not properly arise. See, however, 1 Ala. Rep. (N. S.) 170; 8 Ib. 533; 14 Ib. 693. Neither will we investigate the grave question whether a court of chancery will interfere to correct such mistake as against a subsequent *bona fide* creditor whose debt may have been contracted upon the faith of the property so assured. Confining our opinion to the case before us, and the facts presented by the special verdict, we are constrained to declare there is no error in the judgment. It must therefore be affirmed.

DARGAN, J., dissenting.

MAY v. MAY.

1. Where M. dies, leaving a widow, and three children, each of whom had been advanced in their father's life time, and, on a final settlement of the estate, one of the children brings his advancement into hotchpot, but the other two refuse to do so, the distributive share of the widow is not increased thereby, but is to be ascertained by reference to the *number* of children, whether all of them share in the distribution or not.

Error to the Orphans' Court of Greene. Before the Hon. Sydenham Moore, Judge.

This case arose upon a final settlement in the orphans' court of Greene county, of the estate of William May, deceased. From the record it appears, that the deceased left a widow, the plaintiff in error, and three children, viz: the defendant in error, Moody H. May, and John H. May; that on the final settlement of the estate of said William May, deceased, there was found in the administrator's hands, subject to distribution, the sum of $1,723 65; that each of said children had received advancements from their father in his lifetime; that the defendant in error, who had been advanced two slaves of the value of $500, brought his said advancement into hotchpot, but the said Moody H. and John H. refused to do so, &c.

On this state of facts the court decided, that the plaintiff in error was entitled to only one-fourth of the sum of money in the hands of the administrator, and rendered a decree accordingly. This is now assigned as error.

H. I. Thornton, for plaintiff in error.

In this case there is but one error assigned. In the settlement of the estate in the orphans' court, the widow was allowed in the distribution, only one-fourth; there being three children, and two of them having appeared and waived their claim to any share, on the suggestion that they had been advanced by the intestate.

The main point to be settled is, does the act of distribution intend to make the widow homologous with the children in the matter of distribution, or merely to make the number of children, without regard to their being distributees, or not, a criterion to ascertain the amount to be allotted to her. To maintain the first part of this alternative, I cite the case of Edings v. Long, 10 Ala. 205.

If the widow is identified with the children as a distributee, she ought to have all the benefits of that character; and but for the stringent terms of our statute, limiting her share to the residue of the estate left after the payment of the debts, it might be well contended that she would be entitled to the benefit of advancements, as is the case in North Carolina.—See Taylor's Rep. 213.

I rely strongly on the distinction, where there is a certain

fixed proportion of the estate left by the deceased to be allotted to the widow, and where she is to receive a share that is dependent on the number of children, distributees. The rule, under the English statute—under the customs also of York and London—and in many of the states, where a fixed part of the estate left by the deceased, is given to the widow, I admit to be, that where the advancements are brought in, the widow gets no benefit of them, because they form no part of the estate left by her deceased husband, to which alone she is expressly limited. So also, I admit the rule to be, under the same state of law, that if advancements be brought in, but such advanced children waive any claim, it is immaterial to the widow what becomes of the remainder of the estate, left after she received her certain and fixed amount of what was left by her husband. In conformity with this view is 20th Pick. 67, and Williams's ex'rs, vol. 2, chapters on Distribution under statute, and by the custom, &c.

My conclusion is, that where equality and *a fortiori*, where more than equality is established by law, between the widow and the children, the amount varying with the number of the latter, then the widow should in the distribution, get as much as any child gets, of the subject of distribution, which in this state is the surplus, or residue of personal estate, left after paying the debts of the deceased.

J. B. Clarke and B. F. Porter, contra.

The case of Logan v. Logan, adm'r, 13 Ala. 653, we consider as conclusive of the case. If the widow can claim nothing from an advancement when brought into hotchpot, it necessarily follows that her rights cannot be enlarged by any one one or more of the children declining to bring in their advancements, and come into the distribution.

The widow's share is necessarily ascertained before the question of advancements can come up. The counsel for the plaintiff imagines, that the children mentioned in the statute of 1826, are those who come into the distribution; but this idea receives no countenance from the statute itself. Her share is evidently to be ascertained by first ascertaining the number of children, and descendants of deceased children, if any, left by the decedent at his death, whether they

choose afterwards to come into the distribution with the other children or not. This is the necessary import of the language used.

This position is sanctioned by Williams on Ex'rs, 2 vol. 1102, edition of 1841, Library copy, 949, under the custom of Londen, where it is said, "if one of several children be fully advanced, the effect is, to remove that child entirely out of the way, and to increase the share of the others, and not of the dead man's part." This being a rule under the custom, authorizes us to apply it in the construction of our statute, as the construction of our statute is properly governed by the construction of the English statute, which has been always governed by the practice under the custom. See Kircudbright v. Kircudbright, 8 Ves. 64.

The idea that in ascertaining the share of a widow who dissents from the will of her husband, a child who is disinherited under the will, could not be noticed as a child, may have credit for its originality, but not as a canon of distribution.

COLLIER, C. J.—In Logan v. Logan, adm'r, 13 Ala. R. 653, it was decided that the widow can claim nothing from advancements made by the husband to his children, and by them brought into hotchpot. This conclusion was attained upon the construction of the statute of distributions of 1826, and of the acts of 1822 and 1828, which provide for children of intestates, who have been advanced, bringing their advancements into hotchpot, and the mode of valuing such advancements, &c. We also examined the English statute of distributions of the 22 and 23 Car. 11, ch. 10, and kindred enactments in several of the states of the Union, with decisions adjusting their interpretation. It was added as a clear deduction from these, that "our act of 1826, we have seen declares, the widow's share in the estate of her deceased husband, which shall be left after the payment of his debts, and the previous statutes of distribution of 1806, and 1812, only operated upon the surplus. The statute of 1822, which we have cited, requires the children of the intestate to bring their advancements into hotchpot, where they "shall choose to come into the partition of the estate with the other parce-

ners." What is said in the act of 1826 in respect to the widow being entitled to "a child's part," where there are not more than four children, is restricted by the preceding part of the section to "a child's part," or, in other words, to a share of the decedent's estate proportioned to the number of children, which may remain subject to distribution after his debts are paid. This conclusion is not attained by an application of the principles of construction, but is the clear result of the language employed."

The English statute of distributions is quite as expansive in its provisions as the several enactments of this state, and as it respects the effect of advancements, may furnish a guide for their construction. After providing in what manner the estate of a person dying intestate shall be distributed between his wife and children, it directs that advancements made to any of the children by the intestate, shall be taken into the account, if those thus advanced shall claim a share in the estate, so as to make the portions allotted to the children, or their representatives, equal, as near as may be. 2 Wms. on Ex'rs, 906. "The end and intent of the statute was, to make the provision for all the children of the intestate equal, as near as could be estimated." Id. 917, 918. "If one of the several children be fully advanced, the effect is to remove that child entirely out of the way, and to increase the shares of the others, and not of the dead man's part. If any of the children shall have been advanced partially, they must bring their portion into hotchpot, before they can derive any advantage from the custom. But such partial advancement, like a full advancement, shall be brought into hotchpot with the orphanage part only. Therefore, the children who have been partially advanced, shall bring their portion into hotchpot with the other brothers and sisters only, and not with the widow: for the principle is, as also with respect to the statute of distributions, to make an equality among the children, and not to benefit the widow. Id. 949. See also, Id, 919; 2 Step. Com. 255.

This equitable provision, it has been said, was derived in England from the *collatio bonorum* of the imperial law; which it certainly resembles in some points, though it differs widely in others. But with regard to goods and chattels, it is

"part of the ancient custom of London, of the province of York, and of the sister kingdom of Scotland; and with regard to the lands descending in coparcenary, that it has always been, and still is, the common law of England, under the name of hotchpot." 2 Wms. on Ex'rs, 918. These are the customs to which reference is made by the same learned author in the preceding paragraph. See Lord Kircudbright v. Lady Kircudbright, 8 Ves. 64.

From this view of the law, we think it obvious, the distributive share of the widow in the estate of her deceased husband, under the act of 1826, where there are not more than four children, is to be ascertained by a reference to the number of children. The extent of their advancements, or whether they shall elect to bring them into hotchpot, can have no influence upon the share to be allotted to her. This is ascertained by the statute, and is a "child's part," supposing all the children to participate equally with herself in the estate which may remain after the payment of the debts. She can neither gain nor lose by the advancements being brought in or withheld. The children advanced must elect whether they will come into the distribution, and cannot be coerced; if they come in, the court will see that they share equally in the fruits of their father's acquisitions. Equalization of their portions, is the object to be effected by bringing ing their advancements into hotchpot, and the widow, we have seen, can derive no benefit from them.

If any of the children have been advanced, and decline to come in for a further portion, the reasonable inference is, that they would not be benefitted by such an arrangement, or if they would, that they are willing to yield up the prospect to the other children. If the former motive influenced them, and they really have been fully advanced, then the residue of the estate, after allotting to the widow the share which the statute prescribes, would be necessary to make the children who seek a distribution, equal participants with the others in their father's bounty. If the latter motive supposed, prompted the advanced children to ask nothing more, then the widow can claim nothing from an act of liberality which did not inure to her benefit. This view will serve to show, that the term "children," where it occurs in the statute, can-

not be restricted to such as may come in for a distributive share of the estate. There is nothing in the letter of the act to require such a construction, and we think it unauthorized by the judicial expositions of such enactments elsewhere.

As the case at bar arises upon the distribution of an intestate estate, it is not necessary to inquire whether, where the widow dissents from her husband's will, a disinherited child shall be numbered among the testator's children, in apportioning the widow's share. The result of what we have said is, that the judgment of the orphans' court must be affirmed.

McGEHEE, Garnishee, v. WALKE.

1. A plaintiff in garnishment, as against the garnishee, is substituted merely to the rights of his debtor, and can not subject a demand, on which the debtor himself, if sueing, would not be entitled to recover.
2. If McG., having purchased, at execution sale, the equity of redemption of F. in a tract of land, which F. had previously mortgaged to G. as security for a debt, agrees with F. to divide with him the rents of the land, so long as he retains the control of it, in consideration, that F. will defend a bill of foreclosure, filed by the administrator of G., and furnish proof, that will reduce the debt of, G. to one half the amount claimed, and, in pursuance thereof, F. files his answer to the bill, but fails to furnish any proof whatever, and a decree is rendered for the full amount, it is such a failure of consideration, on the part of F., as discharges McG. from his contract.

Error to the Circuit Court of Perry. Before the Hon. J. D. Phelan.

The facts in this case are fully stated in the opinion of the court.

E. W. Peck, for plaintiff in error.

1. When this case was before in this court, it was held that a demand against a garnishee could be subjected to process of attachment only where a debt actually existed—that it must be such a demand as would enable the creditor himself to maintain either debt or *indebitatus assumpsit.* 11 Ala. Rep. 276.

2. The agreement between the plaintiff in error and Falls was an entire thing, and by it Falls was entitled to half the rent of the land, or he was entitled to nothing. Therefore, the charge, that if there was a partial performance of the agreement on the part of Falls, the jury might proportion their finding according to the benefit the plaintiff in error had received by reason of such partial performance, was erroneous.

3. The consideration for the agreement, on the part of the plaintiff in error, to divide the rent, was the promise of Falls to prove a partial failure of the consideration of the note, on the trial of the chancery suit spoken of in the evidence of the witness Lee. If, therefore, Falls wholly failed and neglected to prove that fact, then there was a failure of the consideration upon which the agreement was founded, and consequently no recovery could rightfully be had in this case. For this reason, the first charge asked, and refused, should have been given. Walke v. McGehee, 11 Ala. Rep. 277.

4. It was not only admitted by the defendant on the trial, but insisted upon before the jury, that the object of the agreement by both parties, was to postpone the decision of the said chancery suit, in order that they might in the mean time divide the rents and profits of the land. The court, therefore, should have charged the jury, that the contract was illegal and void, without adding, that if the jury believed, delay was only expected or even desired as a consequence only, and that they intended to defend the said suit for a partial failure of consideration, that, then, the agreement would not be void;—because, this object being admitted, it was a fact upon which the court should have pronounced the law, without referring it to the jury to ascertain what might have been the expectations or desires of the parties, and thus determining the legal character of the contract,

not by the admitted fact, but by what the jury might believe to have been the expectations or desires of the parties.

5. The charge asked by the plaintiff in error, that if the corn received for the rent of the land for the year 1843, had been used by him, that then he would not be liable in this suit for the proportionate value thereof, should have been given to the jury—because the plaintiff and Falls were tenants in common of the corn. Falls, therefore, could not, on this hypothesis, have maintained *indebitatus assumpsit* against the plaintiff in error. His remedy would have been either, by action of account, trover, special action on the agreement, or by bill in equity. If however, the corn had been actually sold by the plaintiff in error, and the price received in money, then the action of *indebitatus assumpsit* might have been maintained. Cochran v. Carrington & Prall, 25 Wendell's Rep. 409; 2 Caine's Rep. 166; 15 John. Rep. 159; 9 Mass. Rep. 538; 3 Pickering, 420; Rains v. McNairy, 4 Humph. Rep. 356; Weld v. Oliver, 21 Pickering, 559; White v. Osborn, 21 Wend. Rep. 72.

Brooks, contra. 1. The overruling of the demurrer cannot be assigned as error: it was filed to the issue tendered upon the first answer—since then, the cause was tried in the circuit court, and its judgment reversed by the supreme court—a new answer was filed by the garnishee—that answer was contested, and a new issue formed without the interposition of a demurrer. The first issue tendered was good. Myatt et al. v. Lockhart & Massey, 9 Ala. R. 91.

2. The stipulations in the contract are independent, and Falls was entitled to recover without proof of performance of his part of the agreement. Walke v. McGehee, 11 Ala. Rep. 273.

3. The partial performance of his agreement by Falls, was beneficial to McGehee in delaying the chancery suit, and thereby enabling him to obtain the rents of the Fluker land for the years 1843, 1844 and 1845; therefore, McGehee is bound to pay for the partial performance. Chit. on Con. 161, 276, 277.

4. One tenant in common may maintain trover against his

co-tenant for the sale, destruction, or consumption of a chattel. Wilcox & Gibbs v. Reed, 3 Johns. 174. Therefore, Falls could have maintained trover against McGehee, for his use and consumption of the corn. And where one takes the goods of another, and converts them without the owner's consent, the tort may be waived and assumpsit will lie, although there was no contract. Hill v. Davis, 3 New Hamp. 384; Floyd v. Wiley, 1 Miss. 430; Labeaum v. Hill, Ibid. 643; Cunningham and wife v. Noyes, 10 Mass. 435; 4 Esp. Rep. 30.

5. The court did not err, in submitting to the jury the question, whether the corn was used by McGehee or not. And a fair construction of the bill of exceptions shows that circumstances were in proof which authorized the jury to find that fact against the garnishee.

6. One tenant in common may maintain assumpsit for rent against his co-tenant. 9 Mass. 538; Walke v. McGehee, *supra.*

CHILTON, J.—The plaintiff in error was summoned as a garnishee, to answer what he was indebted to John Falls, against whom the defendant in error had sued out an attachment in the circuit court of Perry. He answered the garnishment, denying an indebtedness, and the same being controverted upon the oath of the opposing party, an issue was made up between the plaintiff in the attachment and the garnishee under the statute, and was tried by a jury. The jury found against the garnishee, and a judgment upon their verdict was rendered against him for the sum of $157 25. To reverse which, the case is brought to this court.

1. The questions for revision are presented by a bill of exceptions to the charges refused, and instructions given by the court. It appears by the proof set out in the record, that McGehee had purchased of Falls a tract of land. An execution upon a judgment which constituted a lien on said land, being about to be levied, McG. had it levied on another tract of land which Falls had before that time mortgaged to one Gormon to secure a debt due from Falls to him. The equity of redemption of Falls in this last named tract of land, which is designated in the bill of exceptions as the Fluker tract,

was sold by the marshal, and purchased by McGehee. After this purchase by McGehee of the equity of redemption, Wisener, the administrator of Gormon, the mortgagee, filed his bill for a foreclosure of the mortgage. McGehee and Falls then entered into a contract, the terms of which, as near as we can gather them from the proof in the record, are as follows: Falls having represented to McGehee that the consideration of said mortgage debt to Gormon had failed to the extent of about one half the debt, which he was able to prove, agreed with McGehee that he would defend the suit and make the said proof so as to reduce the mortgage demand, in consideration that McGehee would divide with him the rent of said Fluker tract for the year 1843, and until a final decree of the chancery court foreclosing the mortgage upon said tract. It was further agreed that a fee to the solicitor for defending the suit should be deducted out of said rents. McGehee was the solicitor to whom said defence was entrusted.

Falls filed his answer in pursuance of said agreement, so as to prepare the case for the proof, but afterwards left the State, and removed to Mississippi, and failed to furnish any proof of the failure of consideration as agreed upon. The chancery suit was pending several years, during which time McGehee rented out the Fluker tract, and was finally disposed of in 1846, the bill being taken for confessed against the defendant, Falls, and a decree pronounced for the whole of the mortgage demand.

The question is, whether the failure of Falls to produce proof so as to reduce the amount for which the land was mortgaged, does not relieve McGehee from his promise to divide the rent. The court charged the jury, that if they found the filing of the answer was a part of the consideration for McGehee's promise, such filing would amount to a faithful performance on the part of Falls, entitling the plaintiff to recover a proportionate part for the rent, according to the benefit the said McGehee had received by such partial performance. The garnishee insisted the violation of the contract on the part of Falls discharged him from all liability under the contract, but the court refused so to instruct the jury.

McGehee, having purchased at the marshal's sale the right

to redeem this land from under the mortgage, had an interest in having the demand which was secured by the mortgage reduced as much as possible. He was entitled to the possession of the land, standing in the shoes of the mortgagor, whose interest he had acquired, and was entitled to the rents and profits until deprived of that right by the operation of the decree of the court. Aside, then, from the terms of the contract into which the parties entered, Falls had no claim upon the rents and profits of the land. Let us, then, consider the nature of the contract. It did not provide that Falls should file his answer setting up a sham or simulated defence, so as to stave off the trial of the foreclosure suit, and thus unjustly to retain possession of the land, so as to divide the rents and profits which in the mean time might accrue. Had such been the object and terms of the contract, the court would unhesitatingly pronounce it void, as impeding the due administration of justice, and contravening public policy. But we must presume the object was to make a valid and just defence, going to the consideration of the mortgage debt; and to this end, Falls engages that he will not only file his answer, (for if he had stopped here, the defence of partial failure of consideration would have been unavailing,) but he is to produce the proof to sustain the answer.

When this cause was previously before this court, the chancery suit was still pending. There had then been no violation of the contract on the part of Falls, to make the proof which he undertook to adduce. Then it did not appear but that he would in due time comply with his engagement, and the court held his promise was a sufficient consideration to support an action on the contract against McGehee. It is most manifest that the case now assumes an entirely different aspect. The creditor can acquire no greater right to a participation in the rents under the contract, than Falls himself possessed. Now, suppose Falls had sued upon the contract, and had averred in his declaration the facts as here detailed by the proof. It is perfectly clear he could not have recovered; for he has failed to perform the most essential part of his contract, the production of proof to reduce the demand claimed by the mortgagee, and having violated the contract on his part, could not be allowed to enforce it

against McGehee. Martin v. Chapman, 6 Por. Rep. 344; Martin v. Everett, 11 Ala. Rep. 375. He engaged to make defence by his answer and proof. The defence is the failure of consideration, which the proof must sustain, or it must fail. It does fail. *Non constat*, McGehee has been injured by this failure, to an amount greatly beyond any benefit he may have derived from the partial performance. Be this as it may, the undertaking of Falls is entire. It was to make good the defence, and having failed to comply, he has no legal ground of complaint that McGehee refuses to pay him. 3 Ala. Rep. 440; Ib. 676; 4 Ala. Rep. 336; 2 Pick. Rep. 267; 10 Ib. 209; 4 McCord's Rep. 246; Ib. 26; 4 Greenl. R. 454; 6 Verm. R. 383.

While the part of the contract to be performed by Falls was executory, his promise furnished a sufficient consideration to enable him to recover. 11 Ala. Rep. 273. But when he neglected the performance, until by the termination of the suit upon the mortgage, it was rendered impossible for him to comply, it ceased to furnish a consideration for the undertaking on the part of McGehee.

Putting the contract aside, (as it is very clear Falls could not recover by virtue of it,) it is difficult to conceive upon what principle of law he could recover for the supposed benefit which has accrued to McGehee from the filing of his answer. It is said, delay of the suit was a consequence which resulted from the answer, and McGehee was benefitted by this, in being left for a longer period in possession of the mortgaged premises. Now such benefit is not the necessary or proximate result of filing the answer. Besides, it is not that for which McGehee contracted. If it was, we have seen the contract was void, and the law will never imply a contract, which it would hold void if expressly entered into between the parties. This benefit may have accrued from various accidental circumstances occurring in the progress of the cause, and the plaintiff in error cannot be said, in any just sense, to have acquiesced in a partial performance by its accrual, nor to have dispensed with a full compliance on the part of Falls, by the retention of the land.

It seems to me that it would be impossible for there to exist any legal criterion by which a recovery could be appor-

tioned to a benefit resulting from a combination of accidental causes, and which may in part be a consequence of the part performance, but has no necessary connection with it.

The facts of the case clearly required the court to give the first charge asked for by the plaintiff in error, and as this will probably be conclusive of the case, it is unnecessary to notice the other points raised in the argument.

Let the judgment be reversed, and the cause remanded.

MORGAN v. DOE ON THE DEMISE OF RAMSEY.

1. The agents of the State Bank and its branches, appointed under the statute, possess the same powers in executing process in favor of the bank conferred on sheriffs, and are bound to observe the same rules.
2. A sheriff has no power to sell land, and pass the title to a purchaser, after the return term of the writ, on which he made the levy, unless new process be issued to him for that purpose.

Error to the Circuit Court of Autauga. Before the Hon. G. Goldthwaite.

EJECTMENT by the defendant in error, for a tract of land. From a bill of exceptions, it appears, that the plaintiff below, was the purchaser of the land, at an execution sale, and it appearing that the land was sold by the sheriff after the return day of the execution, in virtue of a levy made previous to the return term, without any other writ authorizing him to sell, the defendant moved the court to charge, that the plaintiff could not recover; which charge the court refused to give, and he excepted. This is assigned as error.

ELMORE and YANCEY, for plaintiff in error.

1. Lands could not be sold under execution, at common

law, and are now subject to sale under a statutory provision. See Clay's Dig. 205, § 17.

2. The passing of title to real estate, by virtue of a levy of *fi. fa.* must be considered a matter *stricti juris*—the prerequisites of the statute must be complied with. Downer v. Harew, 10 Vt. 418.

3. It is the imperative duty of the sheriff, to return process in his hands, according to the statute, whether executed or not. Clay's Dig. 199, § 1; 336, § 131-2; Brown & Milton v. Baker, Sproule & Co. 9 Porter, 503.

4. When the return day has passed, process ceases to have any effect, and a sale of lands, after return day, without additional process, by virtue of a levy made before, is void, as being without authority. Brown & Milton v. Baker, Sproule & Co. 9 Por. 503; Downer v. Harew, 10 Vt. 418; Huggins v. Ketchum, 4 Dev. & Bat. 415; Tarkinton v. Alexander, 2 Ib. 87; Barden v. McKinne, 4 Hawks, 279; Sims v. Randal, 2 Bay. 524; Seawell v. Bank of Cape Fear, 3 Dev. 279.

5. The same principle is recognized in Green v. Burke, 23 Wend. 498; Frost v. Etheridge, 1 Dev. 30, 33; Tayloe v. Gaskins, 1 Ib. 295; Governor v. Eastwood, 1 Ib. 157; Saunderson v. Rogers, 3 Ib. 38; The State v. Greenlee, 4 Ib. 150.

J. W. Pryor, contra.

A sheriff may sell land after a return of the execution, if he made a levy before the return day. Bun v. Dansdale, 2 Bin. 80; Blythe v. Richards, 10 S. & R. 261; Tillotson v. Gregory, 5 Blaithford, 590; Mordecai v. Speight, 3 Dev. 428; Cox v. Joiner, 4 Bibb, 94; Irvin v. Pickett, 3 Ib. 343; Wood v. Colvin, 5 Hill, 228, 231.

A sheriff's deed cannot be impeached collaterally, for any irregularity in his proceedings, or in the process under which he sells, all that is essential in such a case, is a judgment, execution thereon, levy, and sheriff's deed. Ware v. Bradford, 2 Ala. 675.

DARGAN, J.—The agent of the Branch Bank at Montgomery, appointed under the act of 1843, (Clay's Dig. 118,) levied an execution on the land in controversy, which was

issued against White, and was in favor of the bank. The execution was returnable to the circuit court of Montgomery, to be held on the first Monday of March, 1844, but was levied on the land in October previous to the return term of the writ. On the first Monday in April, 1844, the agent of the bank, by virtue of this levy, sold the land to the lessors of the plaintiff, but no other process had issued to him, to enable him to sell. On these facts, the plaintiff in error requested the court to charge the jury, that the plaintiff below could not recover, which the court refused.

The agents of the State Bank, and its Branches, appointed under the act referred to, possess the same powers in executing process in favor of the banks, confided by law to sheriffs, and are bound to observe the same rules in the execution of process, prescribed to the sheriffs. The question therefore arising out of the charge requested, is, can a sheriff sell land after the return day of the execution, by virtue of a levy previously made, and by a sale give the purchaser a good title.

By the statute law of this state, sheriffs are required to return all executions to the clerk's office from which they issued, three days before the term to which they are returnable, and it is very clear, that the authority conferred on the sheriff by the writ, ceases when the return day is past; and if the money due on the execution be paid to him after that time, the payment will not operate as a satisfaction of the judgment. Barton v. Lockhart, 2 Stew. & P. 109; Bobo v. Thompson, 3 Ib. 385; 3 Ala. 299; Chandler v. The State Bank, at the last term.

If a sheriff has not the authority to receive the money, after the return day of the execution, he has not power to sell land by virtue of a previous levy. The object of the sale is, to raise the money, and for this purpose the execution gives him power to sell the land of the defendant, and to pass the title to the purchaser, but after the authority to receive the money is gone, he cannot retain the power to sell.

It is true, that if the levy had been made on personal property, and by virtue of the levy, the sheriff had the possession, he may sell, notwithstanding the return day has passed; for by the levy, and possession, the sheriff has a special property in the goods, and his purchaser will receive by the sale,

the title the sheriff had, and which must be superior to the title of the defendant in execution.

The levy on personal property divests the title of the defendant, as in favor of the sheriff, and the execution will be considered as satisfied, to the extent of the value of the property, unless it be returned to the defendant, or the sheriff be deprived of the possession by his act. He may therefore sell by virtue of his title, although the return day of the writ is past.

But a levy on real estate, gives the sheriff neither title or possession, and a sale by him of land, in order to pass the title to the purchaser, must be made by process, which clothes him at the time, with power to sell, and authority to receive the money. If he sell land by virtue of the previous levy, after the return day of the execution, and without any new process, issued to him for that purpose, the sale is void, and the purchaser acquires no title. Doe v. Kinny, 4 Hawks, 279; Cash v. Sazer, 1 Watts & S. 519; 10 Verm. Rep. 418; 2 Dev. & Bat. 87; 9 Porter, 503.

It is true, that the decisions of the courts of the United States, do not harmonize on this subject, but we think the view we have taken is correct on principle. A purchaser from a sheriff, as from any other person, must show that he acquired a title by his purchase. This cannot be shown, unless the sheriff either had a title in himself at the time he sold, or unless he had the legal authority to sell. The object of clothing the sheriff with authority to sell, is to enable him to obtain the money, in satisfaction of the judgment, and if he had not authority to receive the money, at the time of the sale, from the defendant, it would be absurd to say that he had authority to sell the defendant's land, to enable him to obtain it.

Under the decisions of this court before referred to, a payment by the defendant to the sheriff, at the time of the sale of the land, would not have operated as a satisfaction of the judgment; the sheriff had no right to receive the money, and consequently no authority to sell the land.

Let the judgment be reversed and the cause remanded.

HOWELL v. HAIR.

1. Where the statute of limitations of another state is relied on by the plaintiff in a suit, as vesting in him a right to the property in controversy, if there is a saving or exception in the statute, that will restrain its operation in favor of the plaintiff, it is the duty of the defendant to show it, and not that of the plaintiff to negative its existence.
2. A saving or exception, restrictive of its operation, not found in a statute of limitations, will not be *implied.*
3. The mere fact that a party, having the rightful title to property in Georgia, is a resident of the state of Alabama, and is ignorant as to where the property is, does not relieve him from the necessity of instituting his action for its recovery, within the period, prescribed by the statute of limitations of the former state to bar his right.
4. A purchaser of property, for valuable consideration, without notice, who has been in the quiet and peaceable possession of such property, in the state of Georgia, for a period sufficient to render the statute of limitations of that state an available bar, may recover it from the former owner, from whose possession it was tortiously or feloniously taken, and who has retaken it from such purchaser, after the statute had completed a bar.
5. The statute of limitations of the state in which property is, having created a bar, the title of the possessor of it is complete, although it may be afterwards removed into another state having a longer period of prescription.

Error to the Circuit Court of Sumter. Before the Hon. Geo. Goldthwaite.

This was an actiou of trover by plaintiff, against defendant in error, to recover damages for the conversion of a slave. The facts are set out in a bill of exceptions found in the record. The slave in controversy was once the property of William Drummond, deceased, upon whose estate defendant is administrator, and was left with his wife in Florida, by said Drummond, upon his removal to this state. About the year 1832, the slave was taken by fraud, force, or felony, from the possession of Mrs. Drummond, in Florida, and carried to the state of Georgia, and there sold. In 1832, one Scott was in possession of the slave in Georgia, and, about

the 24th of April, 1834, sold him to one Foster, who in the same year sold him to the plaintiff. The plaintiff and his vendor were both *bona fide* purchasers, for a full and valuable consideration, without notice, and the former retained quiet and peaceable possession of the slave in Georgia, until some time in the latter part of the year 1839, when Drummond, the defendant's intestate, covertly obtained possession of him, and brought him to Alabama. Since that time, the slave has been in the possession of Drummond, and his administrator since his death. The statute of limitations of Georgia, which is quoted at length in the opinion of the court, was read in evidence by the plaintiff. Drummond lived in this State continuously from the time he left Florida to the time of his death, and though he made inquiry, was unable to discover where said slave was, until a few months before he got possession of him in Georgia.

The court charged the jury, that if they should believe from the evidence, that the slave was originally the property of Drummond in Florida, and was taken from his wife, with whom he had left him, by fraud, force, or felony, and carried into the state of Georgia, and there sold to a *bona fide* purchaser for value, without notice, and was retained by said *bona fide* purchaser in his possession under said purchase, for more than four years in the said state of Georgia, the said Drummond being the whole of this time a resident citizen of the state of Alabama, and having no notice of the whereabouts of said slave, or unable to discover where he was by reasonable diligence, that the title accruing to said plaintiff under his purchase, possession, and the statute of Georgia, would not authorize him to recover said slave of the said Drummond, in this state, or his administrator, the said defendant. To this charge the plaintiff excepted, and now assigns it as error.

R. H. Smith, for the plaintiff in error.

1. The charge of the court was abstract. There was no evidence conducing to show fraud, force, or felony.

2. It is not necessary to consider whether a fraudulent concealment of a possession derived by fraud is an exception

to the statute, because there was no evidence of such concealment.

3. Obtaining possession by fraud does not prevent the statute from running. 9 Verm. 110; 17 Wend. 202.

Then we, (being a *bona fide* innocent purchaser) could if we had been sued in Georgia, have set up title by time. And if we had a title by time, we can rely on it in Alabama.—Goodman v. Munks, 8 Por. 84.

Huntington and Hoyt, for defendant in error.

1. The intestate of the defendant in error, as a citizen of Alabama, had a right to avail himself of a statute of this state which is in direct conflict with the legislation of the state of Georgia on the same subject. The Alabama statute is: "If any person or persons, against whom there is or shall be any cause of action, as is specified in the preceding sections of this act, is, are, or shall be, *out of this state at the time of the cause of such action accruing*, or at any time during which a suit might be sustained on such cause of action, then the person or persons who is, or shall be entitled to such action, shall be at liberty to bring the same against such person or persons after his, her or their return into this state; and the time of such person's absence shall not be accounted or taken as part of the time limited by this act." Now the record shows, that Henry Howell was out of this state when the cause of action in favor of William Drummond accrued against him; consequently, whatever may be the phraseology or stringency of the Georgia statute, Drummond would always have had six years after the return or coming of Howell within this jurisdiction, in which to have brought his action, and Howell could not have objected to such action, that the Georgia statute had given him a title by prescription, because such an objection, if allowed, would render nugatory the statute of a sovereign state, enacted for the protection of its own citizens. Hence it follows, that the litigation being in this state, Drummond had a right of action by the *lex fori;* his administrator had the same; yet he could not have had such right of action if the Georgia statute of limitations should be permitted to do away his title. We therefore respectfully suggest, that the effect of a decision in this case as

contehded for is to permit a Georgia statute to override an Alabama statute, and that in our courts, and as against one of our own citizens. The laws of a sister state cannot be permitted to defeat the provisions of our own laws, to interfere with our policy, or to work a prejudice to our citizens. Riggs, use, &c. v. Dyche et al. 2 Sm. & M. 615. Our own court has decided, that a replication to the plea of the statute, that at the time of the execution of the note sued on, the maker resided in North Carolina, and had not resided in Alabama for six years before suit brought, is good on demurrer. Towns v. Bardwell, 1 S. & P. 36, confirmed in Watson v. Brazeal, 7 Ala. 452; see also, Smith v. Heirs of Bond, 8 Ala. 386; Ruggles v. Keeler, 3 Johns. 263, and 7 Mass. 515. The necessary result of such a decision in the present case is, that Howell has a right of action against Drummond's administrator, founded on the Georgia statute, and that Drummond's administrator has the same right of action against Howell, founded on the Alabama statute, whenever Howell returns, or comes to this state. But this right of action might have been asserted by a writ of detinue, levied on the very negro who is the subject of this controversy; yet by the decision of this court, the boy could not have been so taken and levied on, because Howell had a title to him by prescription, founded on the Georgia statute.

The authorities relating to the extra territorial efficacy of the statute of limitations, have reference only to cases where both parties were subject to the jurisdiction of the foreign state, when the bar arising from its statute of limitations attached. See Story's Confl. L. 489, note, and Bulger v. Roche, 11 Pick. 36.

COLLIER, C. J.—The only question in this case is, whether, if property be taken from the possession of the rightful owner, in Florida, by "fraud, force, or felony," carried to Georgia, and there purchased by a third person, for a valuable consideration, without notice of the circumstances of the abduction, or the want of title, in the party who removed it, the possession of the vendee, if continued, in the latter state, for a longer period, than the statute of limitations of that state prescribes, as a bar to an action for its recovery, will give

the vendee a title, on which he may recover the property of the original owner, who "covertly" took it into possession, and removed it into this state? The solution of this question must depend upon the act of limitations of Georgia, which, so far as is disclosed by the record, is as follows:—"All actions of trespass *quare clausum fregit*, all actions of trespass, detinue, actions of trover and replevin for taking away goods and cattle, all actions upon accounts and upon the case, (other than such accounts as concern the trade of merchandize, between merchant and merchant; their factors or servants,) all actions of debt grounded upon any lending, or contract without specialty, all actions of debt for arrearages of rent, and all actions of assault, menace and battery, wounding and imprisonment, or any of them, which shall be sued, or brought at any time after the passing of this act, shall be commenced and sued within the time and limitations hereinafter expressed, and not afterwards; that is to say, the said actions upon the case (other than for slander,) and the said actions for account, and the said actions for trespass, debt, detinue and replevin for goods and cattle, and the said action of trespass *quare clausum fregit*, within three years next after the passing of this act, or within four years next after the cause of such actions or suits, and not after; and the said actions of trespass, assault, battery, wounding imprisonment, or any of them, within one year after the passing of this act, or within two years next after the cause of such action or suit, and not after, and the said actions upon the case for words, within six months next after the passing of this act, or within six months next after the words spoken, and not after."

This enactment, it will be observed, contains no saving or exception, under the influence of which a plaintiff's right of action is continued beyond the period of prescription, and we are not authorized to presume that any such exists in the legislation of Georgia, applicable to the present case. If there is such a provision, it was incumbent upon the defendant to have produced it, and not upon the plaintiff to negative its existence.

In respect to such statutes, it has been so often decided, as to be now indisputably settled, that an exception will not

be implied for the purpose of arresting their operation; that unless there can be found in the statute itself some ground for restraining it, it cannot be restricted by arbitrary addition. Ang. on Lim. 2d ed. 205, 518, *et seq.* This being the law, the residence of the defendant's intestate in Alabama, even coupled with his ignorance where the slave might be found, did not relieve him from the necessity of instituting his action in Georgia, within four years after the sale, in order to prevent the operation of the statute we have cited, when applied to such a case as the present. If solicitous for the recovery of his rights, it devolved upon him to inquire diligently to what point his property had been removed; and if he prosecuted such an inquiry unsuccessfully, it was his misfortune. Bowman v. Wather, 1 How. Rep. (U. S.) 189. If, in the scale of moral justice, his claim was more meritorious than the plaintiff's—a question not presented for our decision—it is a sufficient answer to say, that the legislature have prescribed a period after which it cannot be made available, and that period had elapsed before the plaintiff's possession was disturbed.

It is needless to consider whether a possession, commenced and continued by "fraud, force or felony," can ripen into a title by prescription, as the plaintiff's possession cannot be assigned to either of these categories. The bill of exceptions explicitly states, that he was a *bona fide* purchaser for value, without notice that even suspicion rested upon the title he acquired. These facts being conceded, his possession became adverse the very instant it was acquired, and from that time the statute of Georgia began to run.

Detinue or trover may be maintained upon the mere ground of a previous possession, originally acquired without force or fraud, and enjoyed for a sufficient length of time to make the statute of limitations an available bar. So it has been often decided, that where the possession of personal property has been held in one State for a period prescribed by the laws of that State, beyond which an action cannot be maintained for its recovery, if the possessor afterwards removes into another State, which has a longer period of prescription, the original owner cannot successfully assert a title against him in the latter State. Goodman v. Munks, 8 Port.

Rep. 84, and cases there cited. None of these citations seem to consider it essential to the operation of the act, that the plaintiff resided in the same State, in which the property was enjoyed for the period prescribed, unless the statute contained an exception in favor of persons "beyond seas," &c.; but the reverse, if not explicitly decided, is clearly inferable from the reasoning they employ.

If the defendant's testator had instituted his action in Georgia more than four years after the plaintiff purchased the slave, he must have failed, though during all that time, he resided in Alabama; for the reason that the statute of that State is peremptory in its terms, without any saving in favor of *non-residents.* The bar then being complete in Georgia, the statute (as we have seen) gave a title which may be asserted in any other State, unless it be held to be unconstitutional or inoperative *extra territorium.* We cannot deny to it effect for the first reason; because, not only the constitutionality, but the policy of such enactments, is too well settled to be now controverted. Ang. on Lim. 18 to 20, and cases cited, 2d ed.; McElmoyle v. Cohen, 13 Pet. Rep. 312. The cases collated in Goodman v. Munks, conclusively show that the statute having run in the State where the property was, the title of the possessor is complete every where. Mr. Justice Story, upon this point, says: "Suppose, for instance, (as has occurred) personal property is adversely held in a State for a period beyond that prescribed by the laws of the State, and after that period has elapsed, the possessor should remove into another State which has a longer period of prescription, or is without any prescription; could the original owner assert a title there, against the possessor, whose title, by the local law and the lapse of time, had become final? It has certainly been thought that in such a case, the title of the possessor cannot be impugned. This subject may be deemed by some persons still open for future discussion. It has however, the direct authority of the supreme court of the United States in its favor, and its correctness has been recently recognized by the court of common pleas in England." Story's Confl. of L. § 581, and notes. This being the law, as this court has repeatedly held, it is needless to inquire what influence statutes of limitation professedly upon other

interests or causes of action have, when invoked in a foreign jurisdiction. Id., and § 582; Don v. Lippman, 5 Clark & Fin. Rep. 1.

It is however insisted by the defendant, that the statute of this State must be looked to as furnishing the period of limitation, and the time of the plaintiff's residence in Georgia cannot be computed; and the 8th section of the act of 1802 has been cited as specially applicable. That section declares, that if a party against whom there shall be any cause of action as specified in the act, "shall be out of this State at the time of the cause of such action accruing, or at any time during which a suit might be sustained on such cause of action, then the person or persons who is, or shall be entitled to such action, shall be at liberty to bring the same against such person or persons, after his, her, or their return into this State; and the time of such person's absence shall not be accounted or taken as a part of the time limited by this act." Clay's Dig. 327, § 84. The view we have taken of the effect of the plaintiff's possession in Georgia, makes this enactment wholly inapplicable: besides, the terms used, indicate that it was intended to apply to defendants who resided, or at least had been in this State; or if to a plaintiff, such must have been the fact in respect to him. If the party had not been here previously, how could he "return." But we will not extend this view, as the act is foreign to the point in hand.

The case of Towns v. Bardwell, 1 Stew. & Por. Rep. 36, bears no analogy to the present. There, the defendant pleaded the statute of limitations of this State, to an action on a promissory note; to which the plaintiff replied, that the maker of the note resided in North Carolina at the time it was made, and had not resided in Alabama six years before the writ issued. The replication was held good on demurrer, without reference to the 8th section above cited. It is perfectly clear that the Alabama act of limitations did not begin to run until the defendant removed within the State. But if the North Carolina statute had completed a bar to an action there, then the principle settled in Goodman v. Munks would have applied, if it had been relied on. Watson v.

Brazeal, 7 Ala. Rep. 451, and Smith v. Bond's heirs, 8 Ala. Rep. 386, decide no question in respect to the effect of a foreign statute of limitations, and do not lend any aid to the defence set up in the present case.

The argument that, although the statute designates the action of *trover*, it does not limit the time within which it must be instituted, cannot be supported. That action is said to belong to the class of actions on the case, and was doubtless so considered by the legislature of Georgia. The result of these views is, that the circuit court erred in the charge to the jury. Its judgment is consequently reversed, and the cause remanded.

BONDURANT, Adm'r, &c. v. THOMPSON'S DISTRIBUTEES.

1. A judgment or decree cannot be amended, upon evidence *dehors* the record.
2. In the settlement of an estate in the orphans court the court has no power to allow the set off of a debt, due to the estate, by one of the distributees, against the share of such distributee.
3. Previous to the statute of 1839, authorizing administrators to rent the lands of their intestates, the orphans' court had no power to compel an administrator to account for the rent of land of the estate, received by him.
4. Where a sheriff, as administrator *ex offiicio*, neglects to collect notes, due the estate, until his term of office expires, he will not be chargeable with the amount thereof, if the makers of the notes were perfectly solvent, for a considerable time, after his administration ceased.

Error to the Orphans' Court of Marengo. Before the Hon. James A. Young, Judge.

This was a proceeding by defendants against plaintiff in error, to compel a settlement of his administration of the estate of Nicholas W. Thompson. The plaintiff, as sheriff of

Marengo, was, in 1836, appointed administrator of said estate, and received as assets of the estate, notes on various persons to an amount exceeding $700. He also, between the years 1836 and 1838, received $197 for rent of the land of which his intestate died seized. His term of office expired in August, 1838, at which time the notes remained uncollected, and from which time to 1843, they continued in his hands, no administrator *de bonis non* having been appointed in the mean time. The makers of the notes were perfectly solvent for some time after the expiration of plaintiff's term of office. In 1843, one Dubose was appointed administrator *de bonis non*, and plaintiff immediately turned the notes over to him, but they were then worthless. The plaintiff, in the course of the settlement, which took place in February, 1846, claimed as a credit, $150, due by Sarah Thompson, one of the distributees, on one of the notes received by him, and with which amount he was sought to be charged, but the court refused to allow it. Judgment was entered in favor of the distributees, for the aggregate amount of the notes, and also for the rents received by plaintiff.

At the October term, 1847, a motion was made by the plaintiff to amend the decree, by inserting in it, that at the trial, the plaintiff objected to being held to account, on the ground, that he was never the administrator on the estate of said Thompson, which motion was supported by affidavits, satisfactorily showing that such objection was made, but the court overruled the motion, and at the instance of the plaintiff, signed and sealed a bill of exceptions. The plaintiff now assigns as error, the several rulings and judgment of the court.

Brooks, for the plaintiff.

CHILTON, J.—1. We cannot regard the bill of exceptions in this case, which was sealed more than eighteen months after the final trial, but if we could, it is perfectly clear, that the court below could not properly have made the amendment desired by the motion of the plaintiffs in error. There is nothing in the record by which to amend, and it is well settled that an amendment cannot be predicated upon

matter *dehors* the record. Beuford v. Daniels, 13 Ala. 667, where the authorities are cited. The county court did not therefore err in overruling the motion.

2. In Watson et al. v. McClanahan, Ex'r, 13 Ala. Rep. 57, it was held, that an executor is entitled to payments made by him to a creditor of a legatee, by his direction, when there was an agreement that they should be allowed on settlement as a payment of the legacy. But he has no right to set off a debt due to him against the share of a distributee. Kidd v. Porter, 13 Ala. Rep. 91. This case is not rested upon the ground that the demands are due in different rights, but the set off is rejected for want of jurisdiction in the orphans' court. The set off is in the nature of a cross suit, and as the orphans' court is one of limited jurisdiction, created by, and dependent upon, the statutes for its powers, those statutes having conferred no power to try questions of this kind, we think the judge of that court properly refused to allow the set off.

The record does not show that the administrator received the proceeds of the rent of the land belonging to the intestate in virtue of his office; but it is clear that the land was rented by him before the act of 1839, authorizing him to rent it, and making the proceeds assets of the estate. Not being assets of the estate, the jurisdiction of the orphans' court did not attach; and consequently no decree could be rendered against the administrator for such rent.—Smith's Heirs v. Smith's Administrator, 13 Ala. Rep. 329. The parties entitled must seek their remedy in another forum.

The only remaining point necessary to be considered is, whether the administrator shall be held liable for the notes due to the estate which came into his hands, but upon which he failed to sue. The notes were shown to have been perfectly good long after the administration of the estate by Bondurant ceased, and no injury would have resulted to the estate had an administrator been appointed as the successor of Bondurant. It was the duty of the county judge to have appointed an administrator *de bonis non*, after Bondurant's term of office expired. His failure to do so should not have the effect to charge the plaintiff in error.

The principle settled by Dean and wife v. Eldridge administrator, at the present term, shows, that the bare failure to sue on the part of the administrator, for two years, the parties to the note being perfectly solvent long afterwards, is not sufficient to charge the plaintiff in error. 3 Lit. Rep. 177. The notes being on interest, and perfectly good, a prudent man, having no need for the immediate use of the fund, might well have postponed their collection. It is a sufficient answer to his retention of the notes after his term of office expired, that there was no person to whom he could hand them, and that he did deliver them to his successor upon his appointment.

It results from what we have said, that the judgment of the orphans' court must be reversed, and the cause remanded.

PATTERSON v. POWELL ET AL.

1. The estimated cash value of land, in the neighborhood in which it is situated, and in which it is to be sold, is a circumstance proper to go to the jury, to determine whether the levy was sufficient, or not. The sum for which the land actually sold, is not the only criterion of its value.
2. The sheriff is not responsible for postponing a sale of land, until it is too late to make another levy, and sale before the return day, if in good faith, and in the exercise of ordinary prudence, he was justified in supposing, the land would sell for a sum sufficient, to pay the executions in his hands. The rule it seems is otherwise, in the case of a levy on personal property.

Error to the Circuit Court of Coosa. Before the Hon. G. Goldthwaite.

The plaintiff in error declared in debt against the defendants, as the securities of the sheriff of Coosa, for failing to make the money on an execution issued against Hobdy in his favor. The execution was issued on the 6th day of October, 1841, and on the 15th November was levied on the

lands of the defendant. The land was sold on the first Monday in March, 1842, for $303, and the proceeds applied to older executions, which had also been levied on the same land. It was proved by the plaintiff, that during the time the execution was in the hands of the sheriff, the defendant in execution had personal property in his possession to the amount of $2,500. The defendant proved that he had executions in his hands against Hobdy, in favor of different persons, to the amount of twelve or thirteen hundred dollars, and that the land levied on contained about 960 acres, lying in one body, of which were cleared from 100 to 150 acres, which was in cultivation, and from its location, character of the soil, and growth of timber, was worth from four to five dollars per acre, in cash. The witnesses admitted that they had not known of the sale of any lands in the neighborhood for cash, and did not know what the land would sell for at sheriff's sale. The plaintiff objected to this evidence, on the ground that it was not proper evidence to go to the jury, to show what the land would bring at sheriff's sale; and on the ground that the sale of the land by the sheriff, was the best evidence of that fact. The objection was overruled, and the plaintiff excepted.

The defendants then proved, that immediately after the sale of the land, the executions were levied on the slaves of the defendant, and which were of value sufficient to satisfy the several executions in his hands, and forthcoming bonds were given for their delivery on the first Monday in April, which was a week after the term of the court to which the executions were returnable. The plaintiff objected to the proof of the additional levy, but the objection was overruled. The slaves were delivered on the day appointed, but the sheriff having died before that time, there was no person to receive them, and they were subsequently removed from the state. The plaintiff proved, that there was a mortgage on the land of Hobdy, older than any of the judgments, on which was due $800, of which the sheriff had notice. It was also shown, that the land was bid off by an agent of one Campbell, who was the brother of the sheriff, who controlled one of the executions, and that the sheriff said, that if Hobdy would do what was right, he would cause his brother to reconvey the land back to him.

The plaintiff requested the court to charge the jury, that if the land was incumbered by a mortgage of eight or nine hundred dollars, and Hobdy had in his possession personal property sufficient in value to satisfy the *fi. fa.*, in the hands of the sheriff, the sheriff was not justified in relying on the land to satisfy the executions, and delaying the sale until the first Monday in March, 1842.

2. That the actual amount the lands brought at sheriff's sale, was the highest evidence of the value of the land, and if the executions amounted to $1100, and the value of the land as ascertained by the sale, amounted to $303, then the defendants were liable. The court refused to give these charges, and the plaintiff excepted.

The plaintiff then requested the court to charge the jury, that if Hobdy was in possession of personal property, during all the time the execution was in the sheriff's hands, sufficient to satisfy it, and that the property was run off, soon after the return day of the execution, and no excuse whatever is shown for not selling the land in time to make a re-levy, in case the land proved insufficient to pay the execution, then the defendants are liable. This charge the court gave, but also instructed the jury, that they might look to all the evidence, to determine if the land was of value sufficient to induce an ordinarily prudent man to believe, that they would have sold at sheriff's sale for an amount sufficient to pay all the liens upon it, by mortgage or otherwise; and if they so believed from the evidence, they might regard this as a circumstance, to account for the sheriff's delay in not selling the land in time to make a re-levy; to which the plaintiff excepted.

The plaintiff also requested the court to charge, that if they believed, the sheriff delayed the sale of the land to favor or benefit Hobdy, the defendants were liable. This charge the court also gave, but at the same time instructed the jury, that if they believed that the delay in selling the land, resulted from a belief that it was of value sufficient to satisfy all the liens upon it, and would bring at sheriff's sale a sum sufficient for this purpose—and if they also believed the land to be of sufficient value to authorize a man of ordinary prudence to come to that conclusion, then on this point

they should find for the defendants; to which plaintiffs excepted.

The refusals to charge as asked, and the charges given, are now assigned as error.

Morris, for plaintiff in error.

1. The evidence of the witnesses in relation to the value of the land, should have been excluded; they expressly say, they do not know the value of the land at sheriff's sale. This has heretofore been settled as improper evidence in this very case. See Governor, use, &c. v. Powell et al. 9 Ala. 83.

2. The return of the sheriff shows, that the land was actually put up at sheriff's sale, and sold for $303. This sale is a demonstration of the value of the land at sheriff's sale. To say that the opinion of witnesses can outweigh this grade of testimony, is too absurd to be tolerated. This fact established, the sheriff is liable, having at the time liens in his hands to the amount of $900 or $1,000. This point is also raised in the second charge. See this question decided in Griffin v. Gannaway, 8 Ala. 625.

3. The additional levy should have been excluded. How can a sheriff protect himself by a levy a few days before the return term of the writ? See Hallet v. Lee et al. 3 Ala. 28.

4. The opinion in this case, 9 Ala. 36, was on a state of facts unlike the present; the mortgage on the land was not brought to light on that trial. Now it is in evidence, and presents the question under the circumstances, whether a sheriff can rely on incumbered land, (there being personal property amply sufficient,) for his protection, to the damage and injury of the plaintiff. It is insisted he cannot. The only safe rule is, that the sheriff must, in the absence of a good excuse, sell in time to make a re-levy, should the first prove insufficient. Here the testimony shows, that no excuse whatever existed for the delay.

L. E. Parsons, contra.—1. The rule of evidence in this case has been already laid down, (9 Ala. 83,) and the court below followed it. The value of the land in cash was the only rule by which the sheriff could determine what it would

bring at sheriff's sale. There were 960 acres of land, worth in cash from four to five dollars—$4,080; mortgage incumbrance $800, executions $950—$1,750. Was it not reasonable to suppose this land, lying in a body, improved and well timbered and watered, would bring at sheriff's sale this amount?

2. The second levy was properly admitted in evidence, because it directly rebutted the idea that the sheriff had any intention of favoring Hobdy at the expense of the creditors. It is important to observe that he made this levy forthwith, on finding the land did not bring enough, and that the last levy was on enough of Hobdy's property to satisfy all the executions. Does not this, then, show a disposition to discharge his duties in good faith?

3. The sheriff could not foresee what the land would sell for. He could only exercise his best judgment. Why then should his sureties be estopped by the sale at $303, to show that the land was really worth in cash a sum which would afford reasonable grounds for supposing the money would be made by a sale of it.

4. The offer to prove what Graham said when the property last levied on was brought up for sale, after the sheriff was dead and buried, was certainly not admissible. It was the declaration of a third party, in the absence of all the parties to this suit.

5. The charges given and the qualifications are in the exact language of the opinion on this branch of the case in 9 Ala. 83. The decision at January term, 1848, was on the fraud part of the case. This was abandoned on the last trial.

DARGAN, J.—It is the duty of a sheriff, *in good faith* to execute all process that comes to his hands, and in the exercise of the powers conferred on him for this purpose, he should observe a due regard to the interest of both plaintiff and defendant. If he make an insufficient levy, when the defendant had property sufficient to pay the debt, and thereby fails to make the money according to the mandate of the writ, he is responsible to the plaintiff. If he make an excessive levy, to the injury of the defendant, he is responsible to

him. In determining, therefore, whether the levy is sufficient, or not, he must exercise a sound, and prudent discretion, and the estimated cash value of the property, in the neighborhood where it is situated, and where it is to be sold, is necessarily a circumstance, which he must consider, in determining whether the levy is sufficient or not.

If it so turn out, that the property, although of sufficient value to pay the debt, remains in his hands unsold for the want of buyers, and if by his return he shows these facts, if he has honestly endeavored to *sell it*, he cannot be made responsible because no one will buy. If the property is fairly sold, and brings much less than a man of prudent judgment would have supposed to be its cash value, and what it should have brought at cash sale, the sheriff is not responsible, if he has exercised honesty, and good faith in the transaction. We all know that property at sheriff sale sometimes brings its full value—sometimes, *it is sold* at a great sacrifice; whether it will bring its value, *or near it*, or whether it will be sold for less than one half its value, it is impossible for the sheriff always to foresee; consequently, it would be unjust, and unreasonable, when he is sought to be charged for an insufficient levy, to confine the evidence of the value of the property, to the amount produced at the sale. This view we think is sustained by the case of Powell v. The Governor, use, &c. 9 Ala. 36, and shows that the court did not err, in admitting the evidence objected to, and which tended to show the value of the land in cash.

2. The evidence showed, that the land was mortgaged for about eight or nine hundred dollars. The executions levied on it, amounted to twelve or thirteen hundred. The land was sold incumbered with the mortgage, for $303. The testimony, apart from the sale, showed the cash value to be about $4,000; the sale took place, the first Monday in March. The term to which the execution was returnable, commenced the last Monday; consequently, the sheriff could not levy on and sell slaves after the sale of the land, before the return day of the writ. But immediately after the sale, slaves were levied on, and a forthcoming bond taken for their delivery, on the first Monday in April. The instructions given by the court to the jury on this evidence is, that if the

jury believed from the whole evidence, that the delay in selling the land, until it was too late to levy on and sell slaves, before the return of the execution, resulted from a belief, that the land was of value sufficient to pay all the liens on it, and satisfy all the executions, and would bring at sheriff's sale an amount sufficient for that purpose, and if they further believed, the land to be of sufficient value to authorize a man of ordinary prudence to come to that conclusion, then they should find for the defendants. We think these instructions are fully justified, by the cases of The Governor, &c. v. Powell, which grew out of the levy and sale of the same lands, and also by the case of Powell v. The Governor, &c., both of which are reported in 9 Ala. 36, 83. Both those decisions hold, that the sheriff was not responsible for postponing the sale of the land, until the last sale day. It was done under a well founded belief, that the land would sell for enough to satisfy all liens upon it, notwithstanding the incumbrance *on it, by way of mortgage.* They likewise hold, that the sheriff was not responsible for not making an additional levy, previous to the sale of the land, if he declined to do so under the same belief.

These decisions are decisive to show, that there was no error in this charge. It may be proper however, to add, that we are not inclined to go further, than the decisions referred to require. A sheriff levying on land, incumbered with a mortgage, instead of unincumbered property, if it do not sell for enough to satisfy the debt, must show, that men of good judgment estimated the value of the land for cash, at a sum sufficient to pay the execution, notwithstanding the mortgage, or incumbrance, and that he acted under the impression, that the land at sheriff sale, would bring enough for this purpose. If the evidence does not acquit him of negligence, and also show that he acted in good faith, under the impression that the land, notwithstanding the incumbrance, would bring enough to satisfy the plaintiff's demand, he would be liable.

It is supposed that the case of Hallet v. Lee, 3 Ala. 28, is opposed to the cases referred to in 9 Ala. But they are distinguishable. The levy in that case was on slaves; a forthcoming bond was given, and the sale postponed, until the

last sale day, before the return day of the writ. As the defendant had given a forthcoming bond, whether the sale would take place or not, depended *on his will.* If he saw proper to deliver the property on the day of sale, the sheriff could sell; but it was at the option of the defendant in execution, whether a sale took place or not. This was negligence, as the sheriff could have appointed an earlier day for the sale, and if the property had not been delivered, the bond could have been returned forfeited, an execution issued on the bond, and a sale had, before the term of the court to which the writ was returnable. But in the case at bar, as well as in the cases referred to in 9 Ala., the levy was *on land*, and the sheriff had the right to sell, and did sell, on the day appointed, and no act of the defendant could have prevented the sale, unless he had paid the money.

There is no error in the ruling of the court, and the judgment is affirmed.

NUCKOLS v. MAHONE.

1. The court will not interfere in a summary way by motion, and set aside a sale of land made under execution, upon the ground of the invalidity of the title of defendant in execution, but will leave the party to defend his possession in the ordinary way, when the purchaser asserts his right.
2. It is a sufficient reason for quashing an execution, at the instance of a party, or privy, that it issued after the death of the plaintiff; but the invalidity of the execution, does not warrant the court in setting aside a sale of land made under it, against a *bona fide* purchaser, without notice.

Error to the Circuit Court of Macon. Before the Hon. George W. Stone.

Motion by the plaintiff in error, to set aside a sale of land made under execution. The plaintiff filed his petition for a rule on the parties in intest, setting forth his title to certain

lands, which had been sold as the property of one Williamson Freeman, in virtue of an execution issued on a judgment in favor of James H. Shorter, who was dead at the time the execution issued. The allegations of the petition establish, that the petitioner has the title to the land, by purchase from Freeman, and held the eqitable title.

The defendant cited to contest the allegation of the petition, demurred thereto, and the court sustained the demurrer and dismissed the petition. This is now assigned as error.

J. E. Belser, G. W. Gunn, and S. F. Rice, for the plaintiff in error.

1. A party injured by the improper execution of a *fieri facias*, may obtain redress on motion to the court from which the writ issued, whether he be a vendor with warranty, or purchaser. Mobile Cotton Press v. McGehee, 9 Porter, 679; Abercrombie v. Conner, 10 Ala. 277; Goff v. Jones, 6 Wen. 522; Johnson v. Hardy, 4 Mass. 483.

2. An application to set aside a sale, will be heard at the instance of a *bona fide* purchaser, when the same would be refused at the instance of a stranger. Wood v. Fry, 6 Wen. 563.

3. An execution issued after the death of a sole plaintiff is void, and if the plaintiff dies after the execution is delivered to the sheriff, but before a levy of the same, it abates. Abel v. Ward, 8 Mass. 79; Carter v. Simpson, 7 John. 535; Wagner v. McCoy, 2 Bibb, 198; Case v. Bradford, 7 Wend. 398; Massie v. Long, 2 Ohio, 287; Buckner v. Terrell, Littel, S. C. 29; Bridges v. Caldwell, 2 A. K. Mar. 195; Noe v. Conyers, 6 J. J. Mar. 234; Millroy v. Johnson, 7 Ala. 660; Mansel v. Bank, 4 Ib. 735; Stinnett v. The Bank, 9 Ib. 335; Haden v. Sandy's adm'r. 11 Ib. 43.

4. If any case of the kind can be set aside, the power should be exercised in this case, from the facts contained in the record.

Cocke, contra.

1. The petition is no part of the record, never having been made so by any action of the court, and must be disregarded.

2. The demurrer was properly sustained—1. The neces-

sary parties were not brought into court by the petitioner. The defendants to the judgment were parties in interest, and should have been made parties to the motion. 2. The petitioner had no right to make the motion. He was not a party to the record, and had no such interest in the sale as authorized him to interpose in that summary way. Gassels v. Wilson, 4 Wash. C. C. 59; 8 Johns. 332; 1 Browne, 218; 2 Hill, S. C., 298; Cawthorne v. Knight. 11 Ala. 268. There can be no difference in principle between the case at bar and one in which a claimant attempts to shew the irregularity of the execution, in opposition to the levy of which, he interposes his claim. This cannot be done, even though the execution be void. Blount & Stanley v. Traylor, 4 Ala. 667.

COLLIER, C. J.—In the Mobile Cotton Press &c. v. Moore & Magee, 9 Port. Rep. 679, we made the following deductions from authorities: "1. A party injured by the improper execution of a *fieri facias*, may obtain redress on motion to the court from which the writ issued. 2. That a sale of land will be set aside, where the sheriff is guilty of a mistake, irregularity, or fraud, to the prejudice of either party, or a third person. 3. So the misrepresentation or fraud of a purchaser, furnishes just ground for invalidating the sale." This decision was recognized in McCullum v. Hubbert and Caple, 13 Ala. Rep. 289, in which it was also held, that the fraud which will authorize the court to set aside a sheriff's sale of land on motion, must exist at the time of the sale. Subsequent irregularities will not justify it, but the party aggrieved must assert his rights in another *forum.* Where real estate has been sold under a *fi. fa.*, a motion to set aside the sale will be entertained, not only by a party to the process, but by a previous vendor of the land with a covenant of warranty, any time before the purchaser obtains possession, or recovers it by suit; and even after the possession is obtained, where this takes place in so short a time afther the sale, that application cannot conveniently be made to set it aside. Abercrombie et al. v. Conner, 10 Ala. Rep. 293.

In Chambers v. Stone & Pope, 9 Ala. Rep. 260, it was decided, that the quashing an execution for irregularity, does

not of itself set aside a sale of land made under it. Nor should the sale be set aside, if the purchaser, without notice of the irregularity, has paid his money and obtained a deed. The *onus* of proving such notice lies on the party making the motion.

A motion to amend a sheriff's return, by striking out the levy of the *fi. fa.* on a slave, alledged to be the property of a stranger to the process, will not be entertained at the suit of such stranger. Cawthorn v. Knight, 11 Ala. Rep. 268. It was admitted that the court would, as in the cases we have cited, prevent the abuse of its process by setting aside a levy and sale; but it was added, that "it never has been supposed, that under color of exercising this right, it could in this summary way determine upon conflicting titles to property." See Blount and Stanley v. Traylor, 4 Ala. 667.

The objection to the *fi. fa.* in the case at bar is, that it was issued after the death of the plaintiff therein. This is a sufficient ground for quashing it, at the instance of a party or privy; but if the plaintiff stand in a situation which entitles him to submit a motion for that purpose, the invalidity of the execution does not warrant the court in setting aside the sale against a *bona fide* purchaser without notice. See Chambers v. Stone and Pope, *supra.* Besides, the latent defect in the *fi. fa.* cannot be regarded an abuse of the authority of the sheriff, or in any manner enter into its execution, where the officer has merely followed its mandate. If the land which was sold is really the property of the plaintiff in the motion, he may make his title appear, and defend his possession when the purchaser asserts his right; but we have seen, the conflicting title will not be determined upon the application to set aside the sale. Cawthorn v. Knight, *supra.* See also, Stewart v. Nuckolls, at this term.

Neither of the grounds upon which the rule to show cause was granted, authorized the circuit courr to set aside the sale. The judgment sustaining the demurrer, which, in point of law, was merely a denial of the motion, is therefore affirmed.

BUSSEY v. THE BR. BANK AT MONTGOMERY.

1. In a suit, by the Bank of the State of Alabama or any of its branches, on a joint and several promissory note or bill of exchange, judgment may be rendered, under the statute of 1840, requiring all the parties to be sued in the same action, against any defendant, whom the jury shall by their verdict find liable on it, although other defendants may make a successful defence and defeat a recovery against them.

Error to the Circuit Court of Montgomery. Before the Hon. Geo. Goldthwaite.

This was a proceeding by notice and motion by defendant, against plaintiff in error and one Findley, to recover the amount of a promissory note for $500, purporting to have made by them. Bussey and Findley severed in their pleas—the former pleading, the general issue, and the latter, *non est factum.* The jury found against Bussey, and in favor of Findley, and the judgment of the court was in conformity with the verdict. Bussey moved in arrest of judgment, but the court overruled his motion, and this is now assigned as error.

J. P. Saffold, for plaintiff in error.

"If one is discharged by verdict on a defence which does not arise subsequent to the contract, or is personal to the defendant insisting on it, it will prevent, or be sufficient cause to asrest the judgment against the others." Palmer, use, &c. v. Severance & Stewart, 10 Ala. R. 346; Ivey v. Gamble, 7 Porter, 545; Turner v. Lazarus, 6 Ala. R. 875; Gray's adm'r v. White, 5 Ala. R. 490.

"Even where there is a judgment by default against one, and upon the trial the co-defendants are successful, the effect of the verdict would be to vacate that judgment, and operate a discontinuance of the action." Turner and others v. Lazarus, 6 Ala. Rep. 878.

"Where the holder of a joint and several note sues all the makers, he cannot sever, and take judgment against one

only." Platner v. Johnson, 3 Hill, 476; 2 Sup. U. S. Dig. 224, art. 160.

Where a joint judgment and joint verdict have been rendered against defendants, and there is no evidence to sustain the verdict as to one, the verdict must be set aside, and the judgment reversed as to both. Saunders v. Harris, 5 Humph. (Tenn.) R. 345; 2 Sup. U. S. Dig. 226, art. 205.

The statute law (Clay's Dig. 111, § 39,) providing for a severance in case either party demand it, does not affect this proceeding, as no person demanded a severance, and both defendants were tried before the same jury, at the same time, and the same verdict was in favor of one, and against the other.

J. A. Elmore, contra.

CHILTON, J.—In Turner et al. v. Lazarus, 6 Ala. Rep. 877, it is said that the act of 1818, (Clay's Dig. 323, § 61, 62,) which declares every promissory note, &c. shall be construed to have the same effect in law as a joint and several note, &c., and makes it lawful to sue out process, and to proceed to judgment against any one or more of the makers, and which authorizes the plaintiff in a joint suit against several defendants, to discontinue as to such of them as have not been served with the process, &c., has never been held to authorize a judgment against one joint maker of a note, where all of them have been brought before the court by service of process. It is further added, that this statute does not modify the common law rule, further than to authorize a discontinuance as to those on whom the writ has not been executed.

The common law rule, as it is recognized by the English decisions, undoubtedly is, that in actions *ex contractu*, a discontinuance as to one defendant, sued on the joint contract, is a discontinuance of the entire suit. See 2 Saund. 207, n. 2; also Jones et al. v. Pitcher, 3 Stew. & Por. 135, and cases cited. But this rule, it is said, never extended to those cases where a defendant is discharged by matter arising *subsequent* to the contract, or is personal to the party pleading

it; for example, a discharge in bankruptcy, or in the case of executors, where one is discharged upon the plea of *plene administravit.*

So in Ivy v. Gamble, 7 Porter's Rep. 545, it was held that where one party was discharged upon the plea of the statute of limitations, a judgment would be supported upon the verdict of the jury against his co-obligor, and this, although the plea and replication are joint. The court rest the decision on the ground that the plea is of matter arising *subsequent* to the contract, and is *personal* to the defendant.

So also, in Palmer, use, &c. v. Severance & Stewart, 10 Ala. Rep. 346, where one joint obligor was discharged by his plea of usury, and the other, who had induced the person for whose use the suit was brought to trade for the note, was thereby estopped, it was held, that it was erroneous for the court to instruct the jury, if they found the issue in favor of the first, their verdict should be for both defendants. The court do not decide that judgment could have been entered for the one and against the other, had the jury so found, but merely that a general verdict, concluded the plaintiff from bringing his subsequent action against the party who was bound.

In Hall v. Rochester, 3 Cow. Rep. 374, two defendants to a joint and several promissory note made by three, pleaded that the note was fraudulently and oppressively obtained, upon which the plaintiff entered a *nolle prosequi* as to them, and took judgment by default against the third; it was held the action was discontinued as to all. See also, Max v. Roberts et al. (per Ld. Ellenborough, C. J.) 12 East, 89; 1 Chit. Pl. 35, *et seq.;* Noke v. Ingham, 1 Wills's Rep. 89; Morton v. Croghan, 20 Johns. Rep. 122; Platner v. Johnson & Wheeler, 3 Hill's N. Y. Rep. 476; Saunders v. Harris, 5 Humph. (Tenn.) Rep. 345. These authorities, and others which might be referred to, show quite conclusively, that unless there is some statute which comes to the aid of the defendant in error, the present judgment cannot be sustained against Bussey, but should have been arrested by the court below.

It then becomes necessary to inquire, what effect the act of 1840 has upon the case. Clay's Dig. 110, 111, § 37, 38,

39, 40. This act provides that whenever suit shall be commenced by the Bank of the State of Alabama, or any of the branches thereof, on any bill of exchange or promissory note, it shall be the duty of the attorney to include in the writ or notice, the names of all the parties liable on the bill or note; and when the parties to any such bill or note reside in more counties than one, duplicate writs or notices may be issued to the counties in which they reside. If no defence is interposed to such suit, it shall be the duty of the court to render one judgment against all the parties who are legally before the court, and against whom a recovery may be had: *Provided, however*, that if the acceptor of a bill of exchange is served with process, a several judgment shall be rendered against him in all cases where he is liable for a sum different from the other parties to the bill: *Provided, further*, that it shall be the duty of the clerk to indorse upon the execution which party is drawer, first, second, third indorser, &c. that the money may be collected out of the party first liable. It is further provided by the third section, "that if any defence is made to such suit, and the plaintiff, or either of the several defendants, shall demand a severance, it shall be the duty of the court to award the same, and the suit shall proceed to judgment as if the parties had been severally sued. But if several suits shall be commenced contrary to the provisions of the act, the fourth section provides that it shall be the duty of the court to consolidate the same upon the motion of the defendants, and to compel the attorney issuing the writ or notice to pay the costs occasioned thereby, by process of attachment for contempt: *Provided*, that nothing in the act contained shall prevent the plaintiff from discontinuing against any one or more of the defendants in cases now allowed by law, and from issuing other process against such parties as shall not be prosecuted to judgment." This statute was clearly never designed to take away any remedy the banks had to recover upon their paper, but the object doubtless was to save cost and unnecessary litigation and delay. Before its passage, the bank might have brought separate suits against each of the parties to this note, and have recovered against the plaintiff in error; for the jury, by their verdict, have affirmed his liability. Under this statute, if such suits had

been brought, the defendants could have procured their consolidation, and taxed the attorney with the costs. In such case, the suit would progress as though the parties had been joined in one action, and to deny to the bank the right to take judgment against any one or more of the defendants, (though others may make a valid defence) according to the verdict of the jury, would by implication, be a virtual repeal of the statute declaring such notes to be joint and several. We have said the object of the statute was to save cost and delay, and the court should give it that construction which will best accord with its object and design. Now in the case before us, two parties to the bill are sued; they plead separately, different pleas; the one makes good his defence, but the other is justly liable for the debt. Shall the bank be turned round to its action against him separately, after paying the cost in the present suit? Would not such construction of the statute contravene its obvious design? We think it quite clear that it would. If judgment on the verdict could not be rendered in this case, the result would be to require the bank by the operation of the statute, to bring two suits —one by which it ascertains judicially that a party to the note is not liable, another, to recover from the party or parties who are bound; else, by bringing separate suits, to incur the hazard of having the attorney taxed with the cost, and then a consolidation of the suits on the motion of the defendants. The statute, as its title imports, "changes the manner of bringing suits on bills of exchange and negotiable paper." Each indorsement of a bill of exchange is a separate contract, yet each of the several indorsers are brought before the court as well as the drawer and acceptor, and one judgment rendered against all who are liable for the same sum. In thus uniting various defendants, it would doubtless often happen some one or more of them might have valid defences, and it could not have been intended that in proceeding under such process, the bank must recover against all or none. On the contrary, it is most manifest, the common law rule which requires in actions on contracts where several defendants are joined, that a joint liability must be proved, is wholly dispensed with.

The statute, it is true, provides for a severance at the in-

stance of either of the parties, but this was not designed to give either party a right to a judgment which could not have been rendered without it; but was intended to prevent delay in cases where one party wished to go to trial, and another to continue the cause; or where one of the defendants desired to make a defence, in the expense and delay consequent upon which, another might not be willing to unite. So, where one party insists upon a showing for a continuance of matters affecting only his own liability, the bank could pray a severance, and proceed to trial as to the other parties.

Upon a consideration of the whole statute, we feel fully satisfied that in actions by the Bank of Alabama, or any of its branches, upon any bill of exchange or promissory note, the statute of 1840, requiring all the parties to be united in the same notice, impliedly authorizes a judgment against any of the parties who may be found by the verdict of the jury to be liable, although other parties may make good their defence, and be discharged.

Our conclusion is, the judgment must be affirmed.

POWE & SMITH, Adm'rs, v. EXECUTORS of TYSON.

1. A surety who pays a debt for his principal, six months after his estate has been declared insolvent, may file his claim against the estate, within six months afterwards, if final settlement has not been made, although the creditor had not filed the claim against the estate.

Error to the Orphans' Court of Wilcox.

Sellers, for plaintiff in error.

Johnson, contra.

1. This claim could not have been filed by these parties within six months after the declaration of insolvency; because it did not accrue to them until they had paid it, and if

it was filed within six months after its accrual to them, it is clearly within the spirit and equity of the statute to allow it. The contract of a principal to a note, or other obligation, is of a twofold character. With the creditor he engages to perform his contract, and with his sureties by implication, that he will indemnify them against any loss they may sustain on his account. Both engagements are equally obligatory, but they cannot accrue at the same time—and that of the surety not until the time arrives when he shall have paid the money for his liability to the creditor. From this moment his cause of action accrues, and he has eighteen months within which to enforce it against the estate of his principal.—McBroom et al. v. The Governor, &c. 6 Porter, 43; Cawthorn v. Weissinger, 6 Ala. 716; Hooks & Wright v. Branch Bank at Mobile, 8 Ala. 580; Neil v. Cunningham's Ex'rs, 2 Porter, 171; 4 Day's Rep. 476, on a statute of Connecticut similar to our own.

2. The right of the surety to proceed against the estate of his principal for contribution, arises from the payment of the money. And this right is not affected by the omission of the payee to present it in time. 6 Porter, 43; 6 Ala. 716; 8 Ala. 580. Therefore the demurrer to the plea, that the claim had not filed within six months after the declaration of insolvency, was properly sustained by the court.

DARGAN, J.—Upon the final settlement of the estate of A. K. Smith, which had been duly declared insolvent, Wm. Harris and John B. Twitty, executors of Tyson, presented a claim against the estate for money paid by them as executors, to the Branch Bank at Mobile, on a note to which their testator was the security of Smith, the intestate. To this claim the plaintiff in error objected, because it had not been filed with the clerk of the county court, within six months after the estate was declared insolvent. The proof shows, that Tyson was the security of Smith, and the defendants in error, as the executors of Tyson, paid the debt to the bank, after the six months had elapsed; subsequent to the time the estate of Smith was declared insolvent, and therefore they had no cause of action against the representatives of Smith, until after the six months expired. It did not appear

that the bank had presented the claim to the administrators of Smith, or had filed it in the clerk's office, within six months after the estate was insolvent. The orphans' court allowed the claim against the estate, and to reverse the decree this writ of error is brought.

The only question presented is, whether the orphans' court, on the final settlement of an insolvent estate, should allow a claim which had not been filed with the clerk, in the manner prescribed by the act of 1843, because it did not accrue to the plaintiff until after the expiration of six months from the time the estate was declared insolvent.

The language of the act, is, that every person having any claim against an insolvent estate, shall file the same in the clerk's office, within six months after the estate is declared insolvent, and every such claim shall be verified by the oath of the claimant, &c. Clay's Dig. 194, § 10.

It is very clear, that the debt due to the bank by the estate of Smith, was barred under this statute and in their hands, it should have been rejected; for it was a claim, or debt then owing. But the executors of Tyson, had no claim, or demand on the administrators of Smith, until they paid the debt—*then*, but not until then, *did the debt accrue to them*. But it is contended, that as the claim was barred in favor of the bank, because it was not filed in the clerk's office, within the time prescribed, it cannot be revived by the claimant's paying it afterwards; because, if a debt is barred by the statute of limitations, as to both principal and security, and the security pay it, he shall not have the right to demand and recover the amount of the principal; for his payment was voluntary. But it must be observed, that there is a marked distinction between the case at bar, and the case supposed. The executors of Tyson were under a legal obligation to pay the debt to the bank, notwithstanding it had not been filed in the clerk's office against the estate of Smith; and although legally bound to pay it, they could not be considered the creditors of Smith, or as having any claim against his estate, until they paid the debt.

It seems to me, that the statute was intended to operate on those who had claims or demands against an insolvent estate; hence the language of the statute, every person having

any claim, &c., shall file the same within six months. Can this statute operate on one *who has neither claim*, or *demand*, that a court of law could enforce? We see that one may have neither claim, or demand, against an estate, within six months after it is declared insolvent, yet a claim may accrue to him afterwards, and before the final settlement, by his merely complying with the legal obligations he had assumed. If we hold that his claim is barred, we should hold that a right was taken away by the statute, before that right came into *esse*. We cannot believe that the legislature intended this act to have such effect. It is silent in reference to claims that come into existence after the expiration of the six months; at least nothing is expressly said in reference to them. It speaks of persons having claims—the claim therefore must exist before the statute can operate on it, for no one can have a claim that does not exist.

We come therefore to the conclusion, that if a claim comes into existence, six months after the estate is decreed insolvent, yet it is not to be rejected if filed with the clerk before the final settlement is made, and within six months from the time that it vested in the claimant, or that it came into existence as a claim. We intend, however, to confine our remarks to such claims, or demands, as may result to one from the legal obligation, or condition of things existing between the claimant and the intestate, at the time of his death, and which accrue to the claimant by the observance of those obligations on his part, or a failure to observe them on the part of the intestate. A claim thus coming into life, in favor of one, cannot be barred by the statute before its existence, but becomes subject to the operation of the statute as soon as it does exist.

By these rules, the claim ought not to have been rejected. The executors of Tyson were under a legal obligation to pay a debt of the intestate. They had no claim against his estate until they complied with that obligation—the estate had been declared insolvent six months before they paid the debt, but they filed their claim with the clerk in the manner prescribed by the act, before the final settlement of the estate was made, and within six months from the time they paid

the debt, and therefore within six months from the time they had a claim. The orphans' court properly allowed it, and the decree is therefore affirmed.

STEWART v. NUCKOLS.

1. An execution issued on a judgment, after the death of the plaintiff, is void, and a sale of land made under it, conveys no title to the purchaser.

Error to the Circuit Court of Macon. Before the Hon. Geo. W. Stone.

TRESPASS to try title to land, by the plaintiff, against the defendant in error.

From a bill of exceptions found in the record, it appears, that the plaintiff was the purchaser of the land sued for, at a sale under execution, which issued in favor of James H. Shorter, against Rene Fitzpatrick, and others, and proved the sale to him, and the deed of the sheriff conveying the land, &c. It was admitted, that James H. Shorter was dead at the date of the issue of said execution, under which the plaintiff purchased the land, and that more than a term had elapsed, between the issue of the execution under which the land was sold, and the last execution preceding it. Thereupon the court charged the jury, that the plaintiff was not entitled to recover. To which the plaintiff excepted. This is now assigned as error.

COCKE, for plaintiff in error.

1. The injunction bond is described with sufficient accuracy to authorize a summary judgment, and execution on it. All that is necessary in the description, is such a degree of certainty as will enable the court to identify it. Anderson v. Rhea, 7 Ala. 104; Colburn v. Downs, 10 Mass. 20.

2. The judgment entry omitted to state the christian name of the Mahone who was a party to the confession. This omission it was competent to supply, by reference to other parts of the record, or by extraneous proof, and when so supplied, the defect was amendable, and would be considered as amended, though the amendment was not in fact made. 9 Ala. Rep. 99. The bill of exceptions shows that, by reference to the agreement entered into by the parties to the judgment at law on the minutes of the court, and other proof connected therewith, the fact was fully disclosed that the same Mahone who is described in the injunction bond as a party to the judgment at law, was in truth the one who joined in the confession, and thus, the judgment at law and that described, were clearly identified.

3. It is no objection to the injunction bond as a statutory bond, that two writs of execution were included in it. Winston v. The Commonwealth, 2 Call, 291; Elliott et als. v. Mayfield, 4 Ala. 417.

4. An execution issued after the death of the plaintiff is not void, but voidable only. Day v. Sharp, 4 Wharton, 339; Jackson v. Robins, 16 Johns. 537; Jackson v. Delancy, 13 Johns. 537; Jackson v. Bartlett, Ib. 361; Woodcock v. Bennett, 1 Cow. 740; 2 Saunders, note b, page 6.

5. The same rule applies in the case of the death of the plaintiff, and the failure to issue execution in a year and a day after judgment. Bingham on Judgments, 13 Law Lib. 50, top; see also authorities above cited.

6. In Collingsworth v. Horn, 4 Stew. & Port. 237, it is held, that an execution issued in continuation of a lien acquired during the life time of a defendant, to carry out that lien as to personal property, is not irregular. There can be no difference in principle between that case, and one in which an execution issues after the plaintiff's death to perfect a judgment lien on land acquired in his life time. The execution is a mere authority to sell. Quin et al. v. Wiswall, 7 Ala. 645. The case of Day v. Sharp, 4 Wharton, presents the question fully, whether an execution issued after the death of the plaintiff is void, or voidable only. It was an action of trespass, and plea of justification by virtue of the execution. The case of Jackson v. Robins, 16 Johnson,

particularly, is in support of the same principle, and also shows that in this respect there is no difference between an execution issued after the death of a plaintiff, and one issued after a year and a day. The case of Woodcock v. Bennett, is cited to show the distinction between void and voidable process, and the ground of that distinction.

J. E. Belser and G. W. Gunn, contra.

1. To authorize a judgment upon an injunction bond, the latter must describe the execution or judgment enjoined with sufficient certainty, to enable the court to determine what execution was intended to be superseded. Anderson v. Rhea, 7 Ala. R. 104.

2. Where there is a variance in the name of one of the defendants in the execution, the same is void. The security to the bond has a right to stand upon the precise terms of his contract. Sanford et al. v. Richardson, 5 Ala. R. 618; Meredith v. Richardson, 10 Ala. 829; 4 Ala. 279; 4 Hen. & Mun. 180.

3. The judgments upon statutory bonds will not be sustained, unless all the pre-requisites are complied with, and more particularly will this principle be adhered to, when the judgment is of that character, that a writ of error will not lie to reverse it. Allen v. Hays, 1 Stew. 10; Taylor et al. v. Powers, 3 Ala. 285; Hopkins v. Laud, 4 Ib. 427.

4. A purchaser of lands at sheriff's sale under judgment at law, takes nothing by his purchase, when the judgment is for any cause suspended in its operation; the judgment is a part of his chain of title, and must be effective at the date of the sale of the land. Driver v. Spence, 10 Ala. 540; Bunn v. Webb, 3 Ib. 109.

5. The issuance of an execution, after the death of a sole plaintiff in the judgment, is wholly void, and if the plaintiff dies after the execution is delivered to the sheriff, but before levy, the same abates. Abel v. Ward, 8 Mass. 79; Carter v. Simpson, 7 Johns. 535; Holloway v. Johnson, 7 Ala. 660; 2 Bibb, 198; 7 Wend. 398; 9 Ala. 335.

6. The judgment in this case, which was suspended by the injunction, as shown by the pleadings, all bearing the same number, and describing the debt upon which the judgment

was rendered, was against one of the Mahones; whereas the bond described a judgment against a different one—difference, Edward F. and John, clearly a variance.

COLLIER, C. J.—In Collingsworth v. Horn, 4 Stew. & P. Rep. 237, it was decided that where a writ of *fieri facias* had issued against the estate of an intestate in his life time, an *alias* and *pluries* might be issued thereafter, and *personal property* levied on and sold in order to satisfy the judgment; that the first writ created a lien which the retrospection of the latter, continued and perfected. In fact, the several writs were regarded as a mere continuation of the process, which was necessary to complete the execution. But it was held in Lucas v. Doe ex dem. Price, 4 Ala. Rep. 679, that that decision was inapplicable where real estate was the subject of levy and sale. The original *fi. fa.*, it was said, originated no lien upon the "lands and tenements" of the debtor, that it cannot connect itself with the *alias* and *pluries* for the purpose of showing their regularity, or imparting to them an energy which they do not intrinsically possess. "The judgment itself operates a lien upon the real property; that is, it gives a right to have that property sold, in order that it may be satisfied. By the death of the defendant, his lands descend to his heirs, or vest as he may devise by will, and the mandate of an execution which directs the sheriff to make of them the amount of a judgment, must be wholly inoperative and void. In fact, such a writ could never be executed in consequence of the death of the defendant, which has cast his estate upon other proprietors."

In Mansony and Hurtell v. the U. S. Bank et al. 4 Ala. R. 735, it is intimated in no equivocal terms that a *fieri facias* which requires money to be made of the estate of a deceased defendant, although it be an *alias* or *pluries*, following an original which issued in the life time of the defendant, is absolutely void; and if such process is executed, it will be regarded as a nullity from the beginning, so that a purchaser under it acquires no title as against heirs or devisees. See cases there cited; also Erwin's lessee v. Dundas et al. 4 How. Rep. 58; Fryer v. Dennis, 3 Ala. Rep. 254; Cooper v. May, 1 Harring. Rep. 18; Samuel v. Zachery, 4 Ired. Rep.

377; Davis v. Helm, 3 Smedes & M. Rep. 17; Hubert v. Williams, Walker's Rep. (Miss.) 175; Holloway v. Johnson, 7 Ala. 660; Wood v. Harrison, 1 Dev. & Bat. 356; Perkins v. Ballinger, 1 Hayw. 367; Dudley v. Strange, 2 Hayw. 12.

Though the plaintiff should die within a year and a day after he has obtained judgment, his personal representative cannot have execution against the defendant, without a *scire facias*. If the defendant die within that period, the plaintiff cannot have an *elegit* under the statute of *Westminster*, the 2d Ch. 18, against his lands in the hands of his heir or terre-tenant, or generally any other execution without a *scire facias* against his heir, or terre-tenant, and personal representative. The rule being, that where a new person who was not a party to the judgment, or recognizance, derives a benefit by, or becomes chargeable to the execution, there must be a *scire facias* to make him a party to the judgment, or recognizance. Jefferson v. Morton et al. 2 Saund. Rep. 6, note 1.

In Stymets et al. v. Brooks, 10 Wend. Rep. 206, it was decided that land cannot be sold on an execution issued *after the death of the defendant*, although it is tested as of a day previous to the death. The reasons given, are, that a new party is affected by the execution, and there would be a discrepancy between it and the record, and indeed there is no authority for the process. The court consider the English doctrine which sanctioned the testing of an execution of a day previous to the defendant's death, so as to give it a retrospective lien upon the goods and chattels, and say that it never had any application to an execution against the lands of the debtor.

So in Hildredth v. Thompson, 16 Mass. Rep. 191, it is said by the common law, all proceedings in a suit at law are stoped by the death of one of the parties. If either of them die before judgment, no judgment can be entered; if after judgment no execution can issue. No authority was known, either in England or this country, for issuing an execution, where a party to the judgment was dead, and if an execution issued under such circumstances, it was said *it "must be considered void."*

True, in Day v. Sharp, 4 Whar. Rep. 339, it was held,

that an execution issued in the name of the plaintiff, who is dead, without substituting his personal representatives, was not absolutely void, and it furnishes a justification to the party who caused it to be levied. The court say, that "in case of the plaintiff's death, no doubt it is the duty of the party who issues process of execution, to substitute the name of his executors or administrators; and as there is a new party, to issue a *scire facias*. But the not issuing of a *scire facias* where the law requires it, has not *per se* been considered as making an execution void, or the party issuing it a trespasser." The court seemed to assimilate the case before it to a *fieri facias* sued out after a year and a day after the rendition of the judgment, which is confessedly not void, but merely voidable by some direct proceeding. See Jefferson v. Morton, et al. *supra*, note 1; Jackson v. Bartlett, 8 Johns. Rep. 361. It is further said, that "the line of distinction has not been accurately drawn as to all the cases where the process is merely erroneous, and those where it is an absolute nullity; and perhaps each case must depend in some measure on its own circumstances; but as the issuing of the execution, if done by a party entitled to collect the money upon it, is rather a defect in the formal mode of proceeding, that is to say, the use of the name of the deceased plaintiff, instead of substituting executors or administrators, and issuing a *scire facias*, than a substantial defect, it seems to me on the authorities, that it must in such case be considered as an erroneous proceeding, not an irregular and void one." But whether the execution was merely erroneous, or absolutely void, in the legal sense of those terms, it was said to be a sufficient justification for the party causing it to be issued, when sued in an action of trespass, as well as for the officer, or other person assisting in the execution of it, if the party aggrieved did not cause it to be set aside before the institution of the suit, by some direct proceeding.

The case last cited, it is believed, is indefensible in principle, so far at least as it maintains that an execution which issues in favor of a deceased plaintiff is voidable merely, and we think is not sustained by authority, The analogy of such an execution to one sued out after a year and a day from the time the judgment is rendered, is not perceived. In the lat-

ter case, a satisfaction of the judgment was presumed from the neglect of the plaintiff to enforce its payment. Yet in such case, the judges held, that if the execution issued without a *scire facias*, after a year and a day, and the defendant did not interpose to set it aside, it was an implied admission that the judgment was unsatisfied, and existed in full force. An execution issued under such circumstances, was regarded as a mere irregularity, which it was competent for the party defendant to waive. Erwin's Lessee v. Dundas et al. 4 How. Rep. U. S. 58. See also, 1 Cow. Rep. 711; 20 Johns. Rep. 156; 1 Yerg. Rep. 40; 10 Ib. 328; Preston v. Surgoine, Peck's Rep. 81; 5 Ohio Rep. 221; Battle v. Bering, 7 Yerg. 531.

The argument which establishes the nullity of a *fi. fa.* against the estate of a deceased defendant, it is true, does not in terms apply, where the plaintiff has died before the execution issued, yet we think the same consequence results from the death of either party. It is a legal axiom, that to authorize a court to adjust the rights of parties, and to render an operative judgment between them, there must be what is sometimes called, in technical language, an *actor* and a *reus*, or in other words a controversy conducted by a plaintiff, and defendant, having an actual existence, no matter by what names they are known. If either party die *pendente lite*, or after judgment, the proceeding either abates absolutely, or becomes in a state of suspended animation; in the latter case, the law has in most instances provided a remedy by which renewed vitality may be imparted to it, and the suit proceed to trial and judgment; or if judgment was rendered while the parties were in life, the plaintiff may have execution. But a judgment rendered against either party after his death, and which cannot be referred by relation to a day previous, is a nullity which will not sustain an execution, and may be recalled on writ of error *coram vobis*. See Holford v. Alexander, 12 Ala. Rep. 280, and cases there cited; Finney v. Ferguson, 3 Watts & Serg. Rep. 413; Greenough v. Patton, 7 Watts' Rep. 336; North v. Pepper, 20 Wend. Rep. 677; Jennings v. Ashley, 5 Pike Rep. 128; Pool v. Loomis, Id. 110; Stickney v. Davis, 17 Pick. Rep. 169; Collins v. Prentice, 15 Conn. Rep. 423.

If a sole plaintiff die after judgment, we have seen it loses its active operation, and cannot be enforced. It will not do to say that it becomes merely voidable at the election of the defendant; until it is revived, it is ineffectual, and will not furnish a warrant for an execution to coerce satisfaction of what it adjudges. Its life is suspended. and the authority which it gave to issue an execution, must, for the time being be withdrawn—the legal order for that purpose is withdrawn, and until it is renewed, the judgment stands as if it never had been rendered. Wingate v. Gibson's Ex'r et al. 1 Murp. Rep. 492; Wagnon v. McCoy's Ex'r, 2 Bibb's Rep. 198; Buckner v. Terrill, Litt. Sel. Ca. 29; Newsom v. Newsom, 4 Ired. Rep. 381. This conclusion seems to us to be a necessary sequence from the rule which requires real parties to all process, whether it be original or final; and is necessary to the preservation of harmony and adaptation in legal principles—having decided that an execution issued after the death of the defendant was void, we cannot with propriety say, that the plaintiff's death makes it voidable merely. The *fi. fa.* being void, the levy and sale under it passed no title to the plaintiff, a purchaser; consequently his deed from the sheriff was rightly adjudged insufficient to pass the title of either of the defendants in execution. This view is decisive of the case, and we need not inquire whether the bond for an injunction is so framed as to entitle the obligee to the summary remedy provided by statute. We have but to add, the judgment of the circuit court is affirmed.

CHILTON, J., not sitting.

GOODWIN ET AL. v. McGEHEE ET AL.

1. The decision of the supreme court made in a cause, is the law of that particular case.
2. An averment in an answer to a bill, filed for relief against the stockhold-

ers of a chartered company, "that the company has no real, or personal property, out of which their executions can be satisfied," is a sufficient allegation of insolvency, to let in the defence of an equitable offset.

3. It is sufficient in equity pleadings, if the facts which constitute the defence relied upon, are stated, to entitle the party to the appropiate relief, though a wrong name be given to the defence set up.

4. The complainant must make out the title to the relief which he seeks by his bill, or to some relief consistant with its allegations. The defendant is only required to rebut the plaintiff's equity, and may rely upon matters purely legal, if connected with the matter of the bill for his defence; and may, by a cross bill require the plaintiff to answer thereto.

5. In all cases, where the object is to deprive a party of rights acquired *bona fide*, by affecting him with constructive notice of a pending suit, the *lis pendens* begins from the service of the *subpoena*, and not from the time the bill is lodged in the register's office.

6. The omission of a party to assert a fact material to his defence, which is within his knowledge, though it may not deprive him of the benefit of testimony taken to establish the fact, is a reason for requiring more stringent proof.

7. An insolvent corporation, cannot, by resolution or otherwise, give away the effects belonging to it, to the prejudice of creditors; and any arrangement entered into between the corporation and its stockholders, with the view of defeating the claims of creditors, by which the stockholders were allowed to purchase up depreciated and repudiated claims, and thus to extinguish their indebtedness for stock, would be void, both at law and in equity. But a company having various debtors, as well as creditors, may provide, that if the evidence of the debts due by it are obtained by its debtors, and filed for cancellation, the one shall extinguish the other.

8. A set off in equity, in favor of a defendant, can only be had upon a cross bill filed by him, but when the defence is only in the nature of a set off in equity, by showing a discharge of the liability sought to be enforced, before the filing of the bill, there is no necessity for a cross bill.

9. A corporation, like an individual person, may cancel a debt due it, by setting off a debt from the corporation to the same person; whether the debt be due from a stockholder for stock, or on any other account.

10. After the lapse of seven years, from the time of filing an answer, it is not error in the chancellor to refuse to permit an amended answer to be filed, making an entirely new case, when by the exercise of ordinary diligence, the facts set forth in the amendment might have been ascertained in proper time.

11. The master, when directed to ascertain the facts of a case, may receive the testimony of witnesses pertinent to such facts, without an order expressly directing him to that effect.

Error to the Chancery Court of Montgomery. Before the Hon. J. W. Lesesne, Chancellor.

This bill was filed by the plaintiffs in error against the holders of the stock in the Montgomery Rail Road Company, to subject the amount due from the defendants as such stockholders, to the payment of their several judgments rendered in favor of the plaintiffs respectively on the first Monday in March, 1840, and upon which the plaintiffs aver they have exhausted their legal remedy by returns of *nulla bona*, on executions which have been issued on said judgments.

The bill was filed on the 22d of May, 1841, and was amended in January, 1845, charging that a certain deed of trust executed by the company, transferring the entire effects of the company to trustees to secure certain bonds, was fraudulent. A sale having been made by the trustees under the deed, a supplemental bill was afterwards filed, making the purchaser a party, and attempting to charge the property in his hands as belonging to the company.

Proof having been taken, and a decree pronounced dismissing the bill, the plaintiffs brought the case to this court, (11 Ala. Rep. 437,) where the decree of the court below was reversed, and the cause remanded, that an account might be taken against the stockholders, where stock had not been called in, as to the amount of their indebtedness, for which no call had been made by the company, and it was further considered that the amended and supplemental bills, so far as these seek to charge the trustees, the purchasers under them, and the Montgomery and West Point Rail Road Company, should be dismissed.

After the cause was remanded, the chancellor pronounced a decree, dismissing the amended and supplemental bills, and awarding a reference to the master, to state an account of what was due from the stockholders in conformity to the decree of this court. The master was required to consider the stockholders named in the pleadings, as having transferred or forfeited their stock, not liable to account with the plaintiffs. The master reported upon the matters submitted to him, to which both parties excepted. The chancellor confirmed the report, and decreed accordingly—and both parties now as-

sign error in this court. The elaborate recital of the facts in the opinion of the court, renders a further statement unnecessary.

WILLIAMS, WATTS and ELMORE, for plaintiff in error.

1. Amendments to a bill are always esteemed but a continuation of the original bill, and therefore form a part of it. 1 Dan. Ch. Pr. and Pl. 455, and vide the authorities at n. 1. Amendments then cannot be dismissed unless the entire bill is.

2. The court should have granted the order for reference moved for by complainants, found in the part of the record added by consent. Vide the case of Allen et al. v. Montg'y R. R. Co. 11 Ala. 437.

3. The compact or agreement relied on by McGehee, Scott, Cowles and Taylor, with the trustees, to buy up the depreciated bonds of the company, and they pay off their stock due *bona fide* to the company, and out of which [stock] the creditors had a right to look for the payment of their demands, was fraudulent and void as to the creditors; but it was in effect allowing the stockholders to pay the amount of their stock with a sum far less than the true amount. 19 Johns. Rep. 456.

4. The judgment of complainants against the rail road company secures to them an equity to be paid out of the amount then due by the stockholders, and the purchasing up the bonds of the company, when they were below par, and had been repudiated by the company, does not give such purchasers an equity to set off their bonds in payment of their stock, superior to the equity of the complainants to be paid out of such stock so due; and if it does, this equity cannot exist to an amount more than what they paid for these bonds. Reid v. Norris, 14 Eng. Ch. Rep. 362, and authorities there cited. In the matter of the Receiver of the Middle District Bank, 1 Paige, 585. Vide also Mead v. Merril & Peck, 2 Paige, 402; Reid v. Warren, 5 Ib. 650. The judgment of complainant is conclusive against the stockholders, unless they can shew fraud or error in the judgment. 20 Johns. 669.

5. A bill filed by a creditor to subject equitable assets cre-

ates a lien on those assets from the filing of the bill. 1 Paige, 638; Ib. 637; 5 Johns. Ch. 280.

6. The probata and allegatta must agree. Therefore proof of an existing demand will not be allowed on the allegation of payment, or on the allegation that he owes nothing; such proof can only be allowed on the allegation, and claiming the same as a set off. The plea of set off should discover such a state of facts as would entitle the plaintiff pleading it, to maintain his action at law, if he was plaintiff in the case. Crawford v. Simonton, 7 Port. 110. And a set off cannot be allowed in equity on any other than legal rules, except on the express ground of the insolvency of the party. Tuscumbia R. R. Co. v. Rhodes, 8 Ala. 206. It must then in this case, be on the express allegation in the answer, that the company is insolvent, and this too should be proved. In the case before the court, none of the defendants alledge the insolvency of the company in their answers.

7. The set off here cannot be allowed but by a cross bill; for the allgation insolvency is necessary and material to allow the set off insisted on; and this is an allegation to which the company and the creditors have a right to respond, which can only be done under a cross bill.

8. Set offs are not allowed in equity, except they could have been made at law, unless upon two grounds. 1. Except where a special agreement exists between the parties to allow the set off. French v. Garner et al. 7 Porter, 549. 2. On the express ground of the insolvency. Tuscumbia R. R. Co. v. Rhodes, 8 Ala. 206. If express agreement that these bonds were to be received in payment of stock, then the same should have been alledged and set forth in the answers, which was not done.

Belser and Harris, contra.

1. The case now before the court is not such a one as authorized new proof to be taken before the register. The parties once had an opportunity fully to prove their cause. It was decided on the proof first taken by the chancellor, carried afterwards to the supreme court, and there reversed. The order of the last named court, in the conclusion of its opinion, and the order of reference of the chancellor, based

on it afterwards, shows that the whole matter, should have been decided on the bill, answers, and proofs, in the cause originally taken. Allen et al v. Rail Road Co. 11 Ala. 437; Anderson v. Hooks, Ib. 953; Rake's Adm'r v. Pope, 7 Ib. 162; Kirkman v. Van Lier, Ib. 217.

2. If it was right to re-open the cause to new proof, the answers and proofs connected with the amended and supplemental bills, should have been examined, and if this were done, it will be seen that the whole of the stock contended for, was conveyed away by deed, which deed was executed before complainant's bill was filed, and which has been pronounced by the supreme court to be fair and valid. And the fact, that the supreme court ordered the amended and supplemental bills to be dismissed, does not preclude the chancellor from looking into it as part of the cause, at least so far as the proof taken in it is resposive to defendant's answer to said amended and supplemental bills, and so far as it goes to aid them, in defeating the original bill. If the defendants are liable on the deed set up and inveighed against in the amended and supplemental bills, for their subscriptions to the purchasers under that deed, they ought not to be made liable to these complainants, who obtained their lien, if they have any, on the stock owed for by the defendants, after the execution and delivery of said deed in 1839. Allen et al. v. Montgomery R. R. Co. 11 Ala. 437.

3. The insolvency of the company is shown by the bill, in the averment of the return of *nulla bona*, and that all the other stockholders are insolvent, and out of the jurisdiction of the court.

4. It is stated in the answers, and admitted, that each of the defendants, had paid up seventy per cent. of their subscriptions before the filing of the bill. The remaining thirty per cent. was not called in by a resolution of the board; but there was an agreement with the company and stockholders, if not expressed, at least to be implied, that it should be discharged with the bonds, estimates, &c. against the company. That this agreement is made out, see Bank U. S. 12 Wheaton, 64; Bulkly v. Derby Fishing Co. 2 Conn. 252; White v. Derby Fishing Co. 2 Conn. 260; Canal Bridge v. Gordon,

1 Pick. 297; Dunn v. Andrew's Church, 11 Johns. 118; McGill v. Kaufman, 4 Ser. & Rawle, 317.

5. The agreement to receive the bonds and estimates in payment for stock, was equivalent to a demand of it from the defendants, by the company. It is also an understanding, which amounts to an agreement to procure sets-off against the company, and the company was insolvent, when the bonds and estimates were procured and allowed. In equity, all subscribers for stock, who held bonds, or estimates for work against the company, are discharged *pro tanto*. Decatur Railroad Co. v. Rhodes, 8 Ala. 217; Lindsay v. Jackson, 2 Paige, 582; Nettles v. Elkins, 2 McCord's Ch. 184; Simpson v. Hart, 14 Johnson, 63.

6. The answers of the defendants in each of the cases is responsive to the bill. The defendants are called on to state specficially "what amount of capital stock they and each of them hold in their own names, or in the names of any other persons, what amount they and each of them have paid upon said stock;" this they have fully met in their responses, and if they are sustained, the complainants' case must fail. The complainants no where alledge in their bill, that the defendants had not paid the thirty per cent. before the filing of the bill. They must abide by the case they have made, and must be satisfied with an answer which meets it. Some of the defendants, however, distinctly aver that they had settled with the company before the bill was filed, and all of them can fairly receive that construction. Hughes v. Blake, 6 Wheaton, 472; Daniel v. Taggart, 1 Gill & Johnson, 311; Powell v. Powell, 10 Ala. 909; Strange et al. v. Watson, 11 Ala. 336.

7. The bill is not sworn to, and the answers are, and even if it be held, that the defendants have to prove their answers, still they are a part of the evidence, that the court must look to, in deciding on the correctness of the decree of the chancellor; and when it appears that the bill is not sworn to, and the answers are, and the other testimony in the cause sustains the answer, then the weight of evidence is clearly with the defendants. Moyler v. Moyler, 11 Ala. 621; Hogan v. Bank at Decatur, 10 Ala. 486; Givens v. Tidmore, 8 Ala. 746; Bank v. Marshall, 4 Ala. 60.

CHILTON, J.—1. It is insisted that the chancellor erred in dismissing the amended and supplemental bills; that the amendment is a part of the original bill, and they must stand or fall together.

It is sufficient to reply to this objection, that the previous decision of this cause by this court required them to be done, and that decision must stand as the law of the case. Johnson et al. v. Glascock et al. 2 Ala. Rep. 522; *ex parte* Sibbald, 12 Peters, 492.

2. There was certainly no necessity for a reference to the master to ascertain the time when each of the bonds secured by the trust deed was assigned or transferred to the respective holders, and the consideration for such transfer. This matter was fully decided upon and concluded by the previous decision of this cause in this court, and the chancellor very properly refused the order of reference moved for by the plaintiffs, as the effect of such order would have been to open the whole cause, as though the previous decree had determined nothing.

3. Let us consider the main matter of controversy involved in this cause, which is, are the defendants entitled to insist upon the bonds of the company in their hands as a payment of, or set-off against their indebtedness to the company for stock, which the bill seeks to condemn to the satisfaction of the plaintiffs' judgment.

This claim is resisted by the plaintiffs on several grounds.

1. It is said the bonds cannot be regarded as a payment, inasmuch as they are still held (by some of the defendants) uncanceled; and they cannot be received as sets-off, because they are claimed in the answers *as payments*, and the pleadings are not adapted to the relief which the defendants claim, in this, that there is no averment in the answers that the company is insolvent, and no contract is shown by which they are to be deemed sets-off.

In reply to this objection, we would observe, that the defendants set out the facts which constitute the defence upon which they rely. If, by virtue of the supposed agreement entered into by the company to receive such bonds in payment of stock due the company, the defendants designate their acquisition of such evidence of indebtedness on the part

of the company, *a payment* for their stock, this should not have the effect to bar them of such relief as they might claim consistently with the facts, upon the law of set-off.

The question is not, whether the defendants have given the right name to the defence which they set up in their answers; but whether the facts and circumstances attending the whole transaction amounts to a substantial equitable defence. If they do, and justice has been done by the decree between the parties according to the established mode of procedure in courts of equity, although such proceeding may be liable to hypercriticism, we disregard matters of mere form, and cleave to the substance. 13 Ala. Rep. 770; 2 Sumner's Rep. 143.

But it is said there is no averment in the answers of the insolvency of the company, so as to authorize the chancery court to take jurisdiction of the counter demands sought to be set off, or established as payments. In reply to this objection, it need only be remarked, that this averment is substantially made by the bill, which states that the complainants have returns of *nulla bona* upon executions issued upon their judgments which are for large demands; *and that the company has no personal, or real property, out of which their executions can be satisfied.* We regard this averment in the bill equally as available for the defendants, as if it had been made by them in their answers. There is no principle better established, and more uniformly acted upon, than that the defendant is entitled to the benefit of all the admissions which the complainant makes by his bill. So, if the complainant admits facts in his bill which constitute a valid defence to the equity which he seeks to enforce, the bill would be dismissed for want of equity. The defendant, however, occupies a more favorable position with respect to the jurisdiction of the court than the complainant. The latter must make out his title to the relief which he seeks by his bill, or to some relief consistent with its allegations. The defendants are praying no relief. They are resisting the claim of the complainants, and it is sufficient if they show that as against them the complainants are entitled to no decree. The complainants must make out such a case as shows the court of equity has jurisdiction; the defendant is only re-

quired to rebut the plaintiff's equity, and may rely upon matters purely legal, if connected with the matters of the bill, for his defence, and may require by cross bill the complainant to answer thereto. See Hume v. Long, 6 Morris, 119; Nelson & Hatch v. Dunn, at the present term. The fact of insolvency we are bound to consider as admitted by the pleadings, as upon that fact depends the jurisdiction of the court as to the matter of the complainants' bill. And we must regard the defendants as defending against the creditors of an insolvent corporation, the whole of whose equitable assets the bill seeks to condemn to the satisfaction of their judgments.

2. The complainants insist that no bonds or estimates for work, which the defendants have acquired since *the filing of the bill*, can be set up by them as a defence. The defendants contend that the *lis pendens* must be considered as dating from the service of the subpœna. We would observe that this question, in the present condition of the record, becomes wholly unimportant, as that furnishes no data from which we can ascertain when the subpœna was served. But as the question is presented, we do not hesitate to express as our opinion of the law, that in all cases where the object is to deprive a party of rights *bona fide* acquired, by affecting him with constructive notice, the *lis pendens* begins from the service of the subpœna, and not from the time the bill is lodged in the register's office. This view is sustained by numerous authorities, which may be found collected in Doe ex dem. Chaudron v. McGehee, 8 Ala. Rep. 570; Boynton v. Rawson, 1 Clark's Ch. Rep. 584; 1 Vern. Rep. 319; 2 Johns. Ch. Rep. 576. In such cases, we see no reason why the rule in equity should be more stringent than that which obtains in the correlative proceeding by garnishment at law. Hazard v. Franklin, 2 Ala. 251.

Guided, however, by the only data which the record furnishes, viz., the filing of the bill, let us turn to the pleadings and the proof accompanying the master's report, and ascertain the equities of the respective parties at that period.

McGehee answered that he owed the railroad company for stock, the sum of $210,000; that he had paid seventy per

centum on that sum, amounting to $147,000. That on the 1st May, 1841, the sum of $62,727 was passed to his credit on the books of the company, which, with the accruing interest, will fully meet and pay off the balance remaining against him, whenever it shall be called in. He further avers, that said amount was so passed to his credit for the purpose, and with the express understanding that it should be so applied in payment and liquidation of the other instalments of stock due from him, as the company from time to time should call them in. The answer is silent as to the consideration of the credit thus allowed, but the proof of Bell, the secretary of the company, shows that it consisted of bonds and estimates held by the defendant against said company. A copy of the account, as it appears upon the books of the company between it and McGehee, is made a part of the proof certified in the master's report. This shows that on the first of May, 1841, McGehee was due the company for stock not then called in, the sum of $63,000, and that there was placed to his credit as of that date, the sum $62,727 83. This witness further states he was unable to find the bonds, &c. which had been deposited by McGehee; that the uniform custom of witness was, when such bonds were deposited, to mark them "paid," and that he canceled them by crossing them with a pen. That interest was also calculated on them up to the time of the deposit, and they ceased to bear interest from that period.

The statement taken by the register from the company books, shows the settlement to have been made the first June, 1841, but interest is calculated only to the first May preceding. Speaking in reference to this exhibit, Bell, the secretary, states that he has no recollection when the bonds and estimates mentioned therein were placed to the defendant's credit, except as the dates appear upon the book. At another place, he observes that the entries may have been made the first June, 1841, or a day or two after that period. That in making his entries, when not made on the day of the transaction, and no memorandum was kept of the date, the witness guessed as near as he could as to the true date. This witness (Bell) sold to McGehee two bonds for about fifty cents in the dollar, but the time when he sold them he is un-

able to state. One of said bonds is due the first June, 1841, but when dated, does not appear. He also states that the estimates for work done on the road, were received by the company on the certificates of the engineers in its employ, and the amount embraced in the account copied from the books, was placed to McGehee's credit to meet the remaining thirty per cent.

B. S. Bibb proves that he sold eleven of the bonds mentioned in the exhibit, to McGehee, between the first and fifteenth May, 1841. These amount to $15,000.

J. P. Taylor proves that he sold bonds against the company to McGehee amounting to five or six thousand dollars, which sale was made before the 15th May, 1841, at which time the witness settled with the company. The exhibit shows the defendant McGehee is credited on the books with five bonds at $1,000 each, and interest to the first May, 1841, $466 66, amounting in the whole to $5,466 66.

The estimates for work done are proven sufficiently by Bell, who states that their dates appear on the amount copied from the books, and which show the work was performed by McGehee before the filing of the bill. But we have carefully examined the proof, and we find no evidence to show that McGehee owned at the time of the filing of the bill, or even before the subpœna was served upon him, the following named bonds, for which the chancellor allowed him credit, viz: Bond No. 9, payable 1st March, 1840, to R. G. Brumby, for $1,000; bond of the Co. to Wm. M. McGehee, payable 1st March, 1840, $1,000; another, payable to Wm. M. McGehee, due as above, for $100; bond to John Sullivan, due 1st January, 1841, for $35 06; bond to W. B. Bell, payable 1st February, 1840, for $1,000; another bond to the same, payable 1st June, 1841, for $1,045. The same may be said as to the item in the account stated thus: "John Goodwin, for this sum on judgment in favor of J. G. pro George Goldthwaite, received 10th June, 1840, $780 63." This item, unexplained, is unmeaning; besides, if it amount to a just credit, we should be advised by the proof when it was acquired, in order that we may determine the defendant owned it before the complainants' lien attached to his indebtedness. It is very clear that there has been allowed to

McGehee in the above items, near $5,000 which is not shown by the proof to have been the proper matter for allowance.

In this connection, we would remark, that none of the defendants state in their answers that they were the owners of these estimates and bonds *before* the complainants' bill was filed, or even before subpœna served upon them. They could have made this matter plain; for the facts came within their knowledge, and they should have done so. Their failure to assert a fact so material to their defence, and which is within their knowledge, while in our judgment it does not deprive them of the benefit of the testimony which has been taken, showing the time when these bonds and estimates were acquired, no objection being made to their answers, nevertheless is a circumstance which makes against them, requiring more stringent proof of what they fail to aver.

These bonds, &c. are set up in avoidance of their liability for the stock purchased by them, and for which only partial payments have been made. There is no charge in the bill respecting their acquisition by the defendants, hence the averments made in the answers, setting them up by way of defence, cannot be regarded as responsive to the bill, and must be proved. Gres. Eq. Ev. 288; 2 Ala. Rep. 215; 4 Ib. 60; 2 Stew. Rep. 280; 5 Verm. Rep. 279; 8 Pick. Rep. 113; 2 McCord's C. Rep. 156; 1 Munf. Rep. 373; 2 Bibb, 38; 2 Johns. C. Rep. 89; see also, Silver's adm'r v. Hedges, 3 Dana's Rep. 439.

From this view, it also follows, that the defendants have not sustained any injury by the reception of the proof by the register, in taking the account. In the absence of the proof thus taken, their answers would be unsustained by any evidence, and the court might well have decreed against them for the full amount of their indebtedness, disregarding their counter claims. True, McGehee says a certain amount was passed to his credit, on the 1st May, '41, but as we have said, he states no consideration for such credit. Such loose and obscure statements cannot be aided by intendment, so as to dispense with proof showing the justice of the defence, and making its rejection inequitable. Such credit, if made

without consideration, could be of no avail as against a subsisting creditor of the company.

James M. Hill proves, that the bonds which defendant, Scott, insists upon, were sold by the witness to him, in April, 1841, so that there can be no controversy in respect to their allowance, so far as the facts are concerned.

As to Taylor, Bell states that there was passed to his credit on the books of the company, on the 1st day of June, 1841, the sum of $4,159, and on the 5th July, '41, the further sum of $3,392 88. The credits remained thus until the 5th September, 1845, when a settlement was made. The credits were merely entered for the principal of the bonds which were deposited, and which bore interest from the 1st of March, 1840. The interest on the bonds first deposited added to the principal, would, according to this witness, have paid the thirty per cent remaining due from Taylor to the company for his stock. It appears that these bonds were given by the company, for work done on the road, and were uniformly received by the secretary of the company and credited in payment of stock. The directory having access to the books, and the matter being explained to them by Pollard, the president, made no objection to the credits.

Wm. Knox proves that he sold these bonds, which Taylor claims as an extinguishment of his liability, to Taylor, on the 26th day of May, 1840; that the bonds, with interest up to the time of the sale, amounted to $6,965.

Pollard, the president of the company, testifies, "that it was the custom of the company, when the stockholders came forward and directed it, to receive the claims against the company in payment of calls or assessments of stock, or to leave the claims to their credit, subject to future calls by the company, and this was recognized by the company, or directory, and not repudiated by them." This witness further states, that previous to June term, 1841, Taylor told him he had procured the bonds to pay up the 30 per cent. remaining due for stock. That on the 5th June, 1841, witness, was notified of the filing of the bill, and on that day communicated the fact to the directory, as also the deposite of the bonds by the defendant, Taylor, and the object of

said deposite. That the directory made no objection to the receipt of the bonds in this way.

This evidence, we think, very satisfactorily shows, that Taylor was the owner of the bonds before the exhibition of the bill.

As to the bonds set up by the defendant Cowles, the proof clearly shows, two of them were purchased on the 22d May, 1840, and as to these he was properly held entitled to credit upon his stock, but the chancellor erred in declaring the proof established, that Cowles owned the bond numbered 78, when the bill was filed. Knox proves that he sold him this bond on the 28th June 1841; this, connected with the fact, that he fails in his answer to aver that he did hold the bond before the service of subpœna, makes out a case against him, which is not countervailed by the other proof in the cause. The president and secretary of the company merely depose to entries upon the books, which are shown to have been sometimes made after the transaction occurred, and the dates of the deposites guessed at. The witness Ball, states that he had these bonds some three days before filing the answer of Cowles, which was the 29th June, '41, and at that period they were not marked *paid*, or cancelled, as the secretary states was his custom to mark them, when deposited in payment for stock. In the absence of other proof, we think this bond, (No. 78,) should not be allowed, especially as Jackson, the book-keeper of Knox, proves the correctness of the entry, stating the sale of it to Cowles to have been on the 28th June, 1841.

The answer of Harris admits the indebtedness with which the decree charges him, and the correctness of the decree against him, depends on whether he should have been allowed to file his supplemental, or amended answer. This point we will consider when we come to speak of the assignment of errors on the part of the defendants.

3. It is argued by the plaintiffs, that the defendants cannot in any event be entitled to deduct from their indebtedness for stock an amount greater than the cost of the bonds and estimates for work which they hold.

This is a question not entirely free from difficulty. It is perfectly clear, that the corporation could not, by resolution

or otherwise, give away the effects belonging to it, to the prejudice of creditors; and it is equally clear to my mind, that any arrangement entered into between the corporation and its stockholders, *with a view of defeating the claims of creditors*, by which the stockholders were allowed, after it was ascertained that the corporation was insolvent, to purchase up depreciated and repudiated claims; and thus to extinguish their indebtedness for stock, which was the only fund to which the creditors could resort for payment, would both in law and in equity, be nugatory and void.

In Slee v. Bloom, 19 Johns. Rep. 478, the trustees or directors, had passed a resolution giving to the stockholders the privilege of forfeiting their stock, by paying thirty per cent. by a given time, which sum of thirty per cent. was insufficient to pay the debts due from the company. Spencer, C. J., in delivering the opinion of the court of errors, says, "I do not stop to inquire by what means this resolution was obtained; I pronounce it to be against the fundamental principles of law and equity, legally fraudulent, and thefore void and inoperative." That case however, is not as the counsel supposes, analagous to the case made by the record before us. In that, there was but one creditor; he was present, protesting against the resolution, and advised the trustees that the thirty per cent would not pay his demand. Besides, there was, by that resolution, a discharge of a portion of the debts owing from the stockholders. In this case the company having various debtors, as well as creditors, merely determine, that if the evidence of the debts due from it should be obtained by its debtors, and filed for cancellation, the one should extinguish the other. We see nothing unlawful in this arrangement. There is a total absence of proof, to show that any fraud upon the creditors of the corporation was contemplated, or that any effort was made to decry and depreciate in value the demands against the company. Indeed such an arrangement was well calculated to enhance the value of the bonds issued by the company, by increasing the demand for them; they were at least made equivalent in value to the stock. The rights of creditors were in no way injuriously affected. They still retained the option to sell, or to sue upon their demands. If the stockholders had paid the remain-

der of their indebtedness in money, instead of purchasing bonds, it would have been the privilege of the company to have paid the money to the bond-holders, preferring such as the company chose to pay.

Again—by thus balancing its debts against its credits, no part of the stock or effects of the company is released. And in this particular the case is mainly distinguishable from that of Slee v. Bloom.

There is nothing in the charter of the company, nor in the law of the land, neither is there any principle growing out of the relation which the defendants occupy towards the corporation, which forbids their buying in the bonds and estimates, so as to extinguish their liability, if they are guilty of no fraud, or unfairness, in the transaction.

The creditor, whose bonds and estimates of work have gone towards the extinguishment of the liability for stock, had, before any lien attached, as much right to be paid in full as the complainant. That he has sold his claim for less than its nominal amount, or even for less than its actual value, is a matter between him and the purchaser, and in which the complainants have no concern. Neither is there any thing inequitable in the arrangement, so far as the defendants are concerned ; for the stock for which they have paid is but a just equivalent for the cost of the bonds.

We think that the proof made by the witnesses, Bell, Pollard, and Scott, satisfactorily establishes an agreement on the part of the corporation to receive bonds and estimates in discharge of the 30 per cent remaining due for stock, and that such agreement existed before the filing of complainant's bill. The uniform practice of the corporation to receive and allow them, taken in connection with the other testimony, places the matter, we think, beyond reasonable doubt.

4. But it is urged as a fourth objection to the allowance of the set off, that the defendants should have filed cross bills. That they can pray nothing in their answers but to be dismissed the court, &c.

There can be no doubt that a cross bill may be sustained for the purpose of obtaining an equitable set off. 4 Met. R. 104; 1 Hop. Rep. 239; Danl. Ch. Pr. 1744. And were the defences here set up purely of that character. Were it ne-

cessary for the defendants to have a decree against the corporation, allowing them to set off their cross demands, so as to extinguish the indebtedness sought to be condemned by the plaintiffs to the payment of their judgments, I should hold that a cross bill would be indispensable to the relief. Such however, is not the category in which the defendants are placed. They have already been allowed credit for their demands by the company. They have no further relief to ask respecting them, and having thus extinguished, *pro tanto*, or wholly, the demands against them, they ask to be discharged from the liability to the complainants, and dismissed the court. In such case, it is very clear no cross bill is needed, unless as a means of defence in order to obtain a discovery.

5. We think the objection that the corporation had no power thus to cancel the sums due for stock, wholly untenable. The power to set off one debt against another, in the absence of any express grant of authority conferred by the charter, would seem necessarily to follow from the authority to collect and pay the debts. If the same person is both debtor and creditor, the law does not require the useless ceremony of paying the money, that it may be immediately refunded, when by the mutual consent of the parties, the same result is attained by the extinguishment of both demands.

Having disposed of the points raised in this court by the plaintiffs below, we come next briefly to notice the errors assigned by the defendants.

1. It is insisted on the part of Harris, that he should have been allowed to file his amended answer. His original answer admits his indebtedness to the company, but by the amendment, he avers a forfeiture of his stock, and a sale thereof by the company, under the forfeiture, before the complainants obtained their judgment, which was the first Monday in March, 1840. The amendment further states, that he was not informed of the sale of his stock until the 7th day of December, 1847. The original answer, which was filed some seven years before this amendment was offered, states, that this defendant had only paid 50 instead of 70 per cent. upon his stock, and that the last payment made by him, was on the 13th April, 1840.

Two affidavits are filed, made by the counsel for Harris to sustain the application. One of them states, that before writing the answer, he called upon Bell, the secretary of the company, for information in regard to Harris's subscription for stock, and received from said secretary the amount of it given by the first answer; that he was not informed said stock had been forfeited and sold.

The other affidavit states, that the defendant received his first intelligence as to the forfeiture in November or December, 1847; that on the same day he wrote to his client, who resided some seventy miles distant, giving him information as to the fact; that in a few days thereafter the amended answer was prepared.

Under these circumstances, both the register and the chancellor refused the application to amend the answer. We feel constrained, however harshly the rule may seem to operate in the present case, to decide, that in our opinion they properly overruled the application.

The practice of allowing such amendments, changing the whole character of the defence, or rather making full defence, whereas the original answer made none, after a lapse of some *seven years*, and upon the above showing, would lead to great delay and inconvenience, not to say incalculable mischief. It would be difficult to make any calculation as to the termination of a chancery cause, if, after the lapse of so many years, the parties were allowed, by amendments, to make new cases, and introduce new issues.

We find no authority which sustains such practice, or sanctions the application here made.

It is said that where a defendant seeks to put on record an addition prejudicial to the complainant, the indulgence is only to be granted under very particular circumstances. Edwards v. McLear, 2 Ves. & Bea. 257.

In Wells v. Wood, 10 Ves. 401, the defendant made an application to amend his answer, stating in an affidavit, that from circumstances which had occurred to him since the filing of his said answer, he was satisfied he should have admitted a fact which he had denied. Lord Eldon said, the question as to the amendment is always applied to the discretion of the court in the particular instance, and

that in the case before him the affidavit was not sufficient; that it ought to have stated, that the defendant, at the time of answering, did not know the circumstances upon which the application was based, *or any other circumstances upon which he ought to have stated the facts otherwise.*

So in Curling v. Townsend, 19 Ves. 628, the same learned chancellor said, he "dare not in such case (let the record be what it may) lay down a principle that would form a precedent for permitting an answer, after the lapse of two years. to be altered, in effect from one end to the other."

It has also been held, that an application will not be entertained to file a supplemental answer, changing the whole ground of defence set up in the first answer. Tidsdale v. Bowyer, 7 Sim. 64; 2 Bland, 261; 8 Ves. 79, n. a, and the English and American authorities there collated.

In the case before us, the defendant, who is a member of the corporation, and presumed to be cognizant of its regulations, rests perfectly supine, caring, it may be, nothing for his stock, and making no preparation for his defence, until after the lapse of some seven years he is roused from his apathy by intelligence from his counsel, that his stock was forfeited and sold some year or more, before the bill was filed. He now pleads his ignorance of the facts which ordinary diligence required him to have ascertained, as a reason for the unusual interposition of the court. The established rules of practice forbid that we should aid him. It is true, the rules in respect to amendments may not be so rigid in this country as in England, but we have found no authority which yields such indulgence as is here asked. See the decisions of this court upon the subject of amendments in chancery proceedings, referred to in McKinley v. Irvine, 13 Ala. Rep. 707, the tenor of which fully accords with the view we take of the amendment proposed in this case.

2. There was no error in allowing the proof to be taken by the register. There is no necessity for an order to enable the master, to whom it is referred to ascertain the facts of the case, to receive the testimony of witnesses pertinent to those facts. Perhaps it would be irregular in the master to examine a witness in chief, who had been examined before publication, or to examine the parties, or to examine a

witness previously examined on the same matter, without an order for that purpose. Remsen v. Remsen, 2 Johns. Ch. R. 495. But no question of this kind is raised here. The order of reference is general, and the master is required to examine the parties, and to have the books and papers before him. Aside from this view, however, the defendants, as we have shown, have sustained no injury by the proof, as without it, the matter of their defence falls to the ground, being irresponsive to the allegations of the bill. As to taking additional proof upon a general order of reference, see Kirkman v. Van Lier, 7 Ala. 217.

The proof taken upon the amended and supplemental bills, so far as it was applicable to the issues made by the pleadings in the original bill, should have been received, but upon an examination of it, we do not see that it affects the case made by the original bill, or that either party could have been damnified by its rejection.

3. It is insisted, finally, on the part of the defendants, that the record shows the stock which they are required by the decree to pay to the complainants, really belongs to B. S. Bibb. That it passed to him under his purchase at the sale made by the trustees, in virtue of the deed of trust executed by the company, as brought to view in the amended and supplemental bill, answers, and proof.

This point must be considered as *res adjudicata* by the previous decision of this court, 11 Ala. Rep. 455, *which directs an account to be taken of this stock*, upon an investigation of the whole case made by the original, amended, and supplemental bills, answers, exhibits, and proofs. The effect of that decree would be to estop Bibb, who was a party to the proceeding, from setting up claim to this stock, as he made no claim to it in his answer to the bills. But aside from this, the proof made by him before the register, as also the action of the company in allowing the bonds and estimates transferred by him to McGehee, after the alledged purchase by him, in extinguishment of the stock, he being a member of the company, apprised of the credits, and making no objection, shows he has no claim upon such stock by virtue of the alledged purchase.

It results from what we have said, that there is no error in

the decree of which the defendants shall have advantage. But, as we have seen, the court erred in the amount of the decree rendered against the defendants, Cowles and McGehee; upon the proof certified by the master, the decree as to them is reversed and remanded, that the matter of account may be referred back to the master, with permission and direction to receive and certify to the court the proof which the parties may adduce.

Let the defendants pay the cost of this suit.

TAIT, USE, &c. v. PARKMAN AND WEAVER.

1. When a breach of the condition of a bond is specially assigned, a general plea of conditions performed, is bad—the plea should set out the mode, and manner of the performance. So to such an assignment, a general plea of discharge is bad—every fact showing the legality of the discharge, should be averred.
2. An actual surrender in discharge of the condition of a prison bounds bond, cannot be vitiated, by the motive, or intention, which influenced the surrender into custody.
3. T obtained a judgment for the use of M, against P, and sued out a *ca. sa.*, and died, after which, P executed a prison bounds bond, which was made payable to T, for the use of M. Held, that the executors of T, could not maintain a suit on this bond, against P, for a breach of the condition.

Error to the Circuit Court of Dallas. Before the Hon. N. Cook.

THE plaintiff brought debt, against the defendants, on a prison bounds bond, executed by Parkman as principal, and Weaver as security, and assigned as a breach, that Parkman escaped from the limits as established by law. The defendants filed a number of pleas to the second, third, fourth, seventh, eighth, ninth and fourteenth pleas, the plaintiff demurred, and the demurrer was overruled.

The second plea states, that said Parkman did continue a

prisoner, in the custody, guard, and safe keeping of the keeper of said prison, within the limits of the prison bounds of said prison, as by law established, until he was discharged by due course of law, without committing any escape in the mean time.

Third plea states, that said Parkman did do, and perform, as in and by said writing obligatory, he covenanted to do.

Fourth plea, that said Parkman did surrender himself in discharge of the bond, before the expiration of sixty days, and before any breach of the condition of said bond, to the sheriff, to be kept in close prison, until discharged by due course of law.

Seventh plea, that Parkman surrendered himself to the sheriff, before any breach of the condition of said bond, at the jail of said county to be continued, and kept a close prisoner therein, until discharged by due course of law.

The eighth plea, that the writing obligatory, described in the declaration, was executed on the 29th day of March, 1842, and that on that day, being the day on which the bond was executed, there was no such person in existence as Caleb Tate, the plaintiff's intestate, nor has there since that time, been any such person as Caleb Tate in existence.

The ninth plea, the same in substance as the eighth, with the additional allegation, that Caleb Tate, was the plaintiff in the judgment at law, on which the process issued, by virtue of which Parkman was arrested.

The fourteenth plea, that the said writing obligatory is not their deed; that is to say, they did not execute any such writing obligatory, to the said Caleb Tate, in his life time, and of this they put themselves upon the country.

The plaintiff not pleading over, judgment final on the demurrer was rendered for the defendants. The overruling of the demurrer is here assigned as error.

G. W. Gayle, for plaintiff in error.

1. The second plea is bad, because it avers that defendant Parkman was "discharged by due course of law," without stating how, or in what way he was discharged. The particulars of the discharge must be set forth, so that plaintiffs can show that the discharge was not by due course of law—

not *bona fide*, but colorable. See Monroe and Nelson v. Weaver and Frow, 8 Ala. 288.

2. The third plea is bad, because the manner of the performance is not shown, and because the plea is not in answer to the breach. 3 Ch. Pl. t. p., 985, Plea, and notes K. and M.

3. The fourth plea is bad, because it don't state that the surrender was *bona fide*. Under this plea, if the surrender was colorable, and proof showed a surrender colorable, plaintiff could not recover, because the issue would be the fact of surrender—when if colorable, plaintiff is entitled to a verdict. 8 Ala. 288.

4. The seventh plea is bad, for the same reason. Ib. 288.

5. The eighth plea is demurrable, because—1. The defendant Weaver is estopped from saying there was no such person as Tait, the obligee, when the bond was given. (Tait, use, &c. v. Frow, 8 Ala. 543, is evidently upon the idea that Parkman was a prisoner, and bound to give a bond, or go to jail. Weaver was not bound to go upon the bond, and the reasoning can't apply to him.) 2. But is not the decision in Tait v. Frow, as to estoppel, wrong, and are not the principal and sureties estopped from denying that the obligee was dead when they gave the bond? McWhorter v. McGee, 1 Stew. 548; Crump v. Bennet, 2 Littell, 209. 3. The statute requires the bond to be made payable to the plaintiff in the judgment and execution, and that cannot be a nullity which is executed according to its provisions. Clay's Dig. 499, § 2. 4. The plea don't reach back to the judgment or *ca. sa.*, and therefore admits that the plaintiff was alive when the judgment was rendered, and when the *ca. sa.* issued. If he died between the issuance of the *ca. sa.* and the arrest of Parkman, the bond was properly taken. An *alias fi. fa.*, issuing after the death of a plaintiff, when one has issued in his life time, is regular; and a delivery bond can legally be made to a deceased plaintiff, could the obligor of a delivery bond avoid it because the plaintiff was dead when the *alias* issued. Boyd v. Dennis, 6 Ala. 55.

W. Hunter, contra.

1. The declaration is bad; and if the pleas were defective, the defect should be visited upon the declaration. The de-

claration is bad, because it does not aver the bond was made in the life time of Tait, and also because the breach is defective in not negativing payment to Tait, the intestate. Ch. Pl. 328; 6 Ala. 509; Saund. on Pl. and Ev. 134.

2. As to the pleas of performance, surrender, &c., they are taken in short, and there can be no pretence of any substantial defect.

3. The other pleas to which demurrers were overruled, are those setting up as a defence the fact that Tait was dead when the bond was given. It is maintained that, on no conceivable ground, can these plaintiffs be entitled to recover on this declaration, if these pleas be true. These positions are assumed as the grounds of this conclusion: 1. The question raised is not, was the bond void, but were these plaintiffs entitled to sue and declare as they have done, if the facts stated in the pleas are true. 2. That administrators can only maintain suit on some legal right which arose in the life time of their intestate, or on some contract made with them as administrators after his death, and which contract, or the debt it evidences, forms assets of the estate. 3. That this bond, executed after the intestate's death, created no legal right of action in the obligee. At common law, it is too obvious for argument. Smith's Merc. Law, 134; Chitty on Con. 3; 2 Comyn's Dig. 52; Story on Con. 52; Story on Agency, 507; 1 Johns. 114; 8 Johns. R. 301; 9 Ib. 72; 11 Ala. 340.

DARGAN, J.—We must consider the second and third pleas as averring nothing more than a general performance of the condition of the bond, and the question is therefore presented, whether a defendant can plead *generally*, *conditions or covenants performed*, to a declaration that sets out a specific breach. In the case of the Commonwealth, use of Carswell, v. Gower, 4 Littell, 279, the plaintiff declared on a bond executed by Gower, conditioned faithfully to perform the duties of jailer. The declaration set out a specific breach of the condition, and the defendant pleaded condition performed generally, without setting out the mode or the manner of the performance. To this plea there was a demurrer. The supreme court of Kentucky held the plea to be insufficient; and in the opinion delivered, said, "that an actioe on a deed

containing general affirmative covenants, the defendant may plead performance generally, but if there is a specific breach alledged, the defendant must respond specially to it, and cannot plead performance generally, and thereby throw on the plaintiff the burthen of repeating the same facts in his replication, stated in the particular breach assigned in the declaration.

This we hold to be the correct mode of pleading, and although a defendant may plead performance generally, when no breach is assigned, and thereby compel the plaintiff in his replication to set out the breach on which he relies, yet when the plaintiff assigns specially, the breach of the condition in his declaration, the defendant should plead specially to it, and set out the mode and manner of the performance. The propriety of this mode of pleading will be more apparent, if we reflect, that a condition in a deed may be performed by doing one *of two or three distinct things;* and if the plea of performance is good, to a declaration setting *out a particular breach*, the court could not, by examining the record, ascertain the distinct facts put in issue; nor would the plaintiff be informed of the facts, that the defendant relied on as a defence. For instance, the condition of the bond declared on, might be saved by payment of the debt, or the defendant might have made a surrender of his effects, and taken the benefit of the insolvent laws; or might, at the expiration of sixty days, have surrendered himself to close confinement; either of those acts would have saved the condition of the bond; but which he intended to rely on by the plea of general performance, could not appear; and to hold that the plaintiff should repeat in a replication, the assignment avered in the declaration, to which the defendant should rejoin specially, and in his rejoinder state how the condition was performed, would be to lengthen out the pleadings, and swell the record for no practical purpose whatever.

But it may be said, as the second plea avers, that the defendant, Parkman, did not remain a prisoner, &c. until discharged by due course of law, that the manner of the performance is sufficiently stated. But if we were to consider this in any other light than the plea of performance generally, we would have to intend, that the defendant averred, that

he was discharged by due course of law from the arrest, and did not commit any escape in the mean time. If we were to consider it *a plea of discharge*, it is evidently defective, because such a plea must aver every fact that will show the legality of the discharge. See 8 Ala. Rep. 288. Whether then we regard this plea as a plea of performance generally, or as a plea of discharge by due course of law, it is defective, and the court erred in overruling the demurrer to it. But the fourth plea is clearly good. A principal may surrender himself, in discharge of his bail, and if the surrender is in fact made, and the prisoner in actual custody, the intent, or the *quo animo*, with which the act was done, cannot alter its legal effect. The language of the court, in the case of Morrow & Nelson v. Weaver et al. 8 Ala. Rep. 288, "that if the surrender was colorable merely, it could not discharge the sureties to the bond, *must be understood to mean, if the surrender was pretended merely, but not in truth made*, the sureties would not be discharged. Bnt if it was intended, by that decision, to hold, that notwithstanding the surrender was complete, and the principal in actual custody, yet the intent, or motive that induced the plaintiff to surrender himself to close custody, could influence the legal effect of the act, we should be compelled to this extent to overrule that decision; for we could not inquire what motive or intention influenced the act; nor could the effect of the surrender be influenced by the intent that induced it. The seventh plea being in substance the same as the fourth, the court properly overruled the demurrer to it.

The eighth and ninth pleas show, that Tate, for the use of Edwards, instituted a suit against Parkman, in which judgment was rendered, and a *ca. sa.* issued, but before the bond was executed, Tate died, and the question is, can the plaintiffs, as his executors, maintain a suit on it? It is evident that Tate, the testator, could take no legal right in the bond. There was no such person in *esse* and no legal rights can vest in the dead. Death strips us of all our legal rights, and casts them upon others. If, however, a right is vested in one, whilst in life, his executor may assert it, if it be a chattel interest, after his death, although no cause of action accrued whilst the testator lived.

But to enable an executor to sue, who represents, and in in law is possessed of the rights of the testator, he must show a title in his testator, at the time of his death, and his letters testamentary will then show, that this title vested in him, and relates back to the moment that the testator died. If he fails to show that his testator had any title to the chattel, in reference to which suit is brought, he must fail in the suit. If this view be correct, it is evident that the plaintiffs cannot maintain the action, for although the legal title to the judgment, out of which the bond grew was vested in the testator, yet the bond (if not a nullity) gives a new right entirely distinct from the judgment, although the judgment was the source from which it sprung. It is however suggested, that although no legal title to the bond ever vested in Tate, because he was dead at the time it was executed, yet it must be considered as a contract entered into with the plaintiffs, in their character as executors, and therefore they may sue for a breach of it. To this it may be answered, that they have not so declared; but even if they had, they are not the obligees of the bond. No covenant is entered into with them —neither in their own right, nor in their character as executors; they therefore can take no interest in, or title to it, and cannot maintain a suit upon it.

The fourth plea, we consider as nothing more than the plea of *non est factum*, which being verified, was a sufficient bar. As the court erred in overruling the demurrer to the second and third pleas, the judgment must be reversed, and the cause remanded, if the plaintiff in error desires it.

WILLIAMS v. THE STATE.

1. An indictment, under the 18th section of the first chapter of the penal code, for inveigling slaves, &c., must alledge all the facts necessary to

create the offence denounced by the statute. An indictment charging the offence generally, as a larceny at common law, is insufficient.

2. Upon a conviction on an indictment for the larceny of a slave, in general terms, the prisoner cannot be sentenced to more than five years imprisonment in the penitentiary.

Error to the Circuit Court of Marion. Before the Hon. S. Chapman.

INDICTMENT against plaintiff in error for larceny of a slave, in Fayette circuit court, and transferred by change of venue to the circuit court of Marion. The indictment contains two counts, in the first of which the plaintiff is charged thus:—"That James Williams, late of said county, on, &c., in the county aforesaid, one slave named Albert, of the value of five hundred dollars, of the goods and chattels of John P. Taggert, then and there being found, feloniously did *steal, take and lead away.*" And in the second, in the same words, except that the words used in the last are, "*steal, take and carry away.*" On the trial, the testimony showed, that the slave, Albert, was taken from the possession of the owner, John P. Taggert, at his residence, in Hardiman county, Tennessee, and was afterwards found in the possession of the prisoner, in Fayette county, Alabama. It was admitted by the prisoner, that the evidence on the part of the state was conclusive, except as to the venue. The prisoner's counsel asked the court to charge the jury, that the evidence of the taking of the slave in Tennessee, and his being found in his possession in Fayette county, Alabama, would not authorize a conviction on this indictment, which charge the court refused to give, and the prisoner excepted.

The jury returned a verdict, that they found the defendant "guilty in manner and form as charged in the bill of indictment." The prisoner moved in arrest of judgment, on grounds apparent on the face of the indictment, which motion the court overruled, gave judgment on the verdict, and imposed the sentence of ten years imprisonment in the penitentiary.

The errors now assigned are—1. The refusal of the court to charge as requested by the prisoner's counsel. 2. The

overruling of the motion in arrest of judgment. 3. The judgment and sentence.

W. R. Smith and Peck, for plaintiff in error.
Attorney General, for the state.

COLLIER, C. J.—The 25th section of the 4th chapter of the penal code enacts, that "every person who shall fraudulently or feloniously steal the property of another, in any other state or country, and shall bring the same within this state, may be convicted and punished in the same manner as if such larceny had been committed in this state; and in every such case, such larceny may be charged to have been committed in any county, in or through which such stolen property may have been brought." Clay's Dig. 420, § 25. By the 18th section of the same chapter, it is enacted, that "every person who shall inveigle, steal, carry, or entice away any such slave, with a view to convert such slave to his own use, or the use of any other person, or to enable such slave to reach some other state or country, where such slave may enjoy freedom, such person shall, on conviction, be punished by confinement in the penitentiary not less than ten years." Clay's Dig. 419. The first question presented under these several enactments, is, whether a party guilty of the offence denounced by the first, can be convicted under a common law indictment for laceny?

In the State v. Brown, 4 Port. Rep. 413, it was said not to be always sufficient to pursue the very words of the statute, unless by so doing, the fact, in the commission or omission of which the offence consists, is fully, directly, and expressly alledged. So in the State v. Duncan, 9 Port. R. 260, it was held, that where a statute is introductive of a new offence, and prescribes its constituents without reference to any thing else, in an indictment founded upon it, it is enough to describe the offence in the very words of the act." See also, The State v. Click, 2 Ala. Rep. 26; Turnipseed v. The State, 6 Ala. R. 664; Worrel v. The State, 12 Ala. R. 732. In Mooney v. The State, 8 Ala. Rep. 328, the indictment was founded upon the 18th section above recited, and pursued its terms. The court held, that the indictment was not

bad for duplicity, and said it was perfectly clear, both from the phraseology of the statute, and the mischief intended to be prevented, that it was the intention of the legislature to create an offence essentially distinct from larceny at common law." *Further*, "There does not appear to be any tangible or substantial distinction between the terms *inveigle* or *entice*, as employed in this act. Both signify to allure, to incite, to instigate, to seduce to the doing some improper act. It is true, *entice* may be used in a good sense, but that is not its natural meaning, and when so used, it is figurative, and shown to be so by the context; here, it is evidently used in its natural, proper sense. The word *steal* being technical, ordinarily imports a larceny; but here it is evidently employed as a synonime of *carry away;* for the act declares that the offence shall be complete, though there is no intention to convert the slave to the use of the taker, or of any other person, which is an essential ingredient in larceny. These are then, all offences of precisely the same grade, although there may be a slight distinction between the two classes of *stealing* and *carrying away*, and *inveigling* and *enticing*."

The 18th section, as it stood at the first enactment of the penal code was in the following words: "Every person who shall inveigle, steal, carry, or entice away any slave, without the consent of such slave, or shall hire, aid or counsel any person to inveigle, steal, carry or entice away, as aforesaid, any such slave, with a view to convert such slave to his own use, or to the use of any other person, or to enable such slave to reach some other state or country, where such slave may enjoy freedom, such person, on conviction, shall be punished by confinement in the penitentiary, not less than ten years." The words "with or," which preceded "without" in the original draft, being unintentionally (no doubt) omitted in copying the act before it became a law. In an indictment for larceny between the time when the code was adopted and this section, was modified in 1843, this court said, "it will be evident, on looking at this enactment, that it only covers the case of stealing a slave *without his consent*, and with *the particular views, or one of them*, indicated by the terms used. It may be asked, how was the stealing of a

slave, with his consent, punished? It is in effect urged that it was not punishable by law, as there is no statute expressly, and in terms covering such a larceny; and it is said that slave stealing was not an offence known to the common law." It was added, that slaves in this State, have always been considered property, and are within the general terms goods or chattels; and that under the provision of the code which declares the larceny of these when of greater value than twenty dollars, punishable by imprisonment in the penitentiary not less than two, nor more than five years, all cases of slave stealing not embraced by the special statute are included. Nabors v. The State, 6 Ala. Rep. 200. This last citation is not applicable since the modification of the 18th section, which embraces the stealing of slaves under all circumstances, under which the legislature intended the larceny of that description of property should be punished.

It is abundantly shown by the cases cited, that an indictment founded upon that section, should substantially and with particularity alledge the existence of such a state of facts as constitute the offence. Though the proof of them would establish a larceny at common law, it is not sufficient for the indictment to charge that offence in the general terms which are sanctioned by precedent. The statute must be followed, and *quo animo* the act was committed, must be specially stated. It is clearly indicated by the case cited from 8th Alabama, that the law as it now stands, is introductive of an offence which the common law did not denounce as criminal; and that the crime which was punishable by pre-existing statutes was to some extent modified, and its essential constituents particularized.

If the prisoner could be punished under the indictment, he could only be confined in the penitentiary from two to five years; for these are the shortest and longest terms which the statute defining grand larceny prescribes. So, that even if his conviction was regular, the judgment sentencing him to ten years' imprisonment would be too long. But the proof did not sustain the indictment; for the 25th section declares that where the larceny is committed in another State, and the property brought into this, the offender "may be convicted and punished in the same manner as if such larceny had been

committed in this State. If he is to be thus "convicted and punished," he must be charged by an indictment in the same form. We have seen that if the offence had been committed here, the indictment must in its allegations have conformed to the statute, and that the prisoner could not have been convicted upon one which charged a larceny in general terms.

This view is decisive of the cause, and relieves us from the examination of the other questions raised upon the record. The judgment is consequently reversed, and the clerk of this court will issue a mandate addressed to the sheriff of Fayette county, embracing therein the judgment of this court, ordering him to demand the prisoner of the warden or lessee of the penitentiary, and requiring the warden or lessee to deliver the prisoner to said sheriff, upon being furnished with a copy of the mandate, and a receipt at the foot thereof, acknowledging such delivery; and commanding the said sheriff to transfer the prisoner to the jail of his county for safe keeping, until he shall be discharged by process of law, or regularly removed to some other place for trial or confinement.

KING AND ANSLEY, Adm'rs, v. SMITH AND STEELE.

1. Prior to the passage of the act of 4th February, 1846, a court of chancery would not entertain a bill filed by an administrator *de bonis non* against a former executor or administrator in chief of the same estate, for an account of assets, that had been wasted, embezzled or misapplied by him.
2. When the orphans' court, in a matter of concurrent jurisdiction, has taken cognizance and proceeded to a final decree, a court of chancery will not interfere, unless the bill alledges some *special* reason for its interposition.

Error to the Chancery Court of the 18th District. Before the Hon. W. W. Mason, Chancellor.

THE bill in this case was filed on the 5th April, 1844, by the plaintiffs in error, as the administrators *de bonis bon*, with the will annexed, of Jeremiah Smith, deceased, against the defendants in error, the first of whom, Smith, was executor of said will, and the other a security on his bond. It alledges that said Smith qualified as executor in 1834, took possession of the assets to the value of about $16,000, and from year to year up to 1839, received large profits from the same: that he conducted himself so badly as such executor, that in 1837 the orphans' court of Autauga county revoked his letters testamentary: that he has never accounted for his administration of said estate, has become insolvent, taken the benefit of the bankrupt act, and removed from the State, &c. The prayer of the bill is for an account, &c. Service was perfected on Steele by subpœna on the 12th July, 1844, and a decree *pro confesso*, after publication, was entered against Smith in the September following. Steele answered the bill, in which he averred that he had made a full and final settlement with the orphans' court of Autauga county, and annexed to his answer a transcript from said court, the substance of which is sufficiently set forth in the opinion of the court, for a full understanding of the question it presents.

The chancellor dismissed the bill, and this is now assigned as error.

T. & J. WILLIAMS, for plaintiffs in error.

1. It is admitted that at common law, the administrator *de bonis non*, is only entitled to the goods in specie, unadministered by his predecessor, yet that under our statute, he has a right to an account from his predecessor, where that predecessor has been removed by the judge of the orphans' court, for mal-conduct as administrator. Clay's Dig. 221, § 4; Chamberlin, adm'r, v. Bates, adm'r, 2 Porter, 555, 556; Judge of Benton Co. Ct. v. Price et al. 6 Ala. 39; Salter v. Cain, 7 Ala. 478.

2. If the removed administrator is only liable to the distributees, this would force the creditors into equity against such distributees; where the administrator *de bonis non* should not have in his hands in specie of the unadministered goods

sufficient to pay their demands. And this is not like the case where an administrator resigns, for there, under the statute, he is bound for all the assets not fully administered, or paid over to his successor, (Clay's Dig. 222, § 9;) and by his plea of resignation, he must set forth that he has fully administered, &c. Thomason and Haynes v. Blackwell, 5 Stewart & Porter, 181.

3. Although it is not denied, at law a previous suit may be necessary against the executor or administrator, before the security can be resorted to; yet in chancery no such procedure is necessary; as where, from necessity, the complainant in the first instance must go into chancery against the principal, to prevent multiplicity of actions, the security should be made parties; (Batchelor v. Elliot's adm'r, 1 Hen. & Munf. 10,) or where the principals are insolvent—Moore et al. v. Waller's heirs, 1 Marshall, 490; Copwood et al. v. Wallace, 12 Ala. 796; Moore v. Armstrong, 9 Porter, 697. And in certain cases, even where the proceedings have commenced in the orphans' court, chancery may take jurisdiction, retain it for all purposes, and make a final settlement—as in cases of trusts under wills, and especially where a discovery of assets is wanted; as is the case here—for there chancery has exclusive jurisdiction. Blakey, adm'r, v. The heirs of Blakey, 9 Ala. 391; Leavens v. Butler and wife, 8 Porter, 399. And even where a settlement is made in the orphans' court, after the bill is filed, as was the case here, such settlement will not be regarded in chancery. Holton and wife v. Blackerly et al. 5 Dana, 529.

4. But an administrator who has been removed, as was Smith, has no rights as an administrator—they are gone; he cannot even take out execution on a judgment recovered by him while administrator, nor sever the moiety so recovered. Salter v. Cain, 7 Ala. 478.

5. But the settlement insisted on by defendants, is inoperative, for the statute requires the account to be "stated, and audited." Vide Clay's Dig. 226, § 27; Robinson and wife, et al. v. Steele, adm'r, 5 Ala. 473. The settlement relied on, is on a condensing or aggregate, of former annual returns of Smith.

6. John Steele, the security, is not discharged, because of

Pilant, the co-security's discharge—1. Because Pilant alone petitioned for discharge, as he had a right to do. Vide Clay's Dig. 221, § 5. And the discharge is to Pilant only. 2. Because the discharge to Pilant is void, inasmuch as the order for his discharge was made the 27th of February, 1837, some time before a new bond was taken, indeed on the very day the order to give the new bond is entered.

J. A. Elmore, contra.

1. The final settlement and decree of the orphans' court is binding on all parties interested. That was a court of competent and concurrent jurisdiction, and first obtained and exercised its jurisdiction. Eaton v. Patterson, 2 S. & P. 9; Dobbs v. Cockerham, 2 Porter, 328; Wyman v. Campbell, 6 Porter, 219; Horn's legatees v. Grayson, 7 Porter, 270; DeVertner v. McMarran, Freeman, (Ch.) 136; Jones v. Coon, 5 S. & Mar. 751; Gildart v. Stark, 1 How. (Miss.) 450; Griffith v. Vertner, 5 How. (Miss.) 736; Blanton v. King, 2 Ib. 856; Clay's Dig. 300, § 21; Constitution of Ala. § 8 and 9.

2. No reason is assigned why the court should oust the orphans' court of its jurisdiction; such reasons must be specially alledged; and complainants show no right to maintain the suit. King v. Shackleford, 6 Ala. 423; Ib. 518; Knotts v. Tarver, 8 Ala. 743; Kirkman v. Van Lier, 7 Ib. 217, and cases cited on p. 224; Davis v. Yerby, 1 S. & Mar. (Ch.) 508; Prosser v. Yerby, 1 How. (Miss.) 87; Moore v. Armstrong, 9 Porter, 697; Edmundson v. Roberts, 2 How. (Mi.) 822; Blanton v. King, Ib. 856.

3. An administrator *de bonis non*, can maintain no suit against prior executor or administrator, except for the property or assets remaining in specie unadministered. Prosser v. Yerby, 1 How. (Miss.) 87; Stubblefield v. McRaven, 5 S. & Mar. 130; Kelsey v. Smith, 1 How. (Miss.) 68; Byrd v. Holloway, 6 S. & Mar. 323; Chamberlain v. Bates, 2 Porter, 550; Moore v. Armstrong, 9 Ib. 704, and cases cited on p. 705—unless on grounds provided for in the statute. And in such cases, the bill should charge that Smith was removed on one of these grounds, and should also state some reason why the aid of this court is sought, and it would seem on authority in such a case, that the complainants could not

even sue at law. Clay's Dig. 221, § 4; King v. Shackleford, 6 Ala. 425; Judge B. C. C. v. Price, Ib. 36.

4. As to Steele, the bill cannot be sustained, because it shows Pilant a co-surety with Steele, and his release, and does not charge a devastavit before his release. The charge of waste would be necessary, if creditors, or legatees, were complainants. 1. As to the release—Clay's Dig. § 5, 7, p. 291-2; Towers v. Riddle, 2 Ala. 694; Polk v. Wisener, 2 Humph. 520; Russel v. McDougald, 3 S. & Mar. 234; MacKay et al. v. Dodge et al. 5 Ala. 388. 2. As to the devastavit—Governor v. Robbins, 7 Ala. 79; Townsend v. Everett, 4 Ala. 607.

5. After Smith's removal, on the 11th December, 1837, Steele is not liable. His liability, if at all, is for acts previous, or assets previously received, and wasted, or unaccounted.

6. Steele cannot be charged at law, even by creditors or legatees, without alledging waste. And there is no sound reason or principle for permitting it in chancery. On authority, it appears that Steele could not be sued on his bond in the first instance, on such an allegation at law. Judge B. C. C. v. Price, 6 Ala. 36; Leavens v. Butler, 8 Por. 399; Prosser v. Yerby, (Miss.) 1 How. 87; Chamberlain v. Bates, 2 Por. 550; Glenn v. Conner, Harper's Eq. 267.

7. All the parties should have been brought before the court. No excuse is given why Pilant's representatives were not made parties, except that Pilant was released, and if so, Steele is also. 3 Ired. 589; 9 Porter, 697, and cases cited on p. 708.

8. A final decree settles the principles of the case, and an order of reference would have done this. On the case as made, the complainants had no right to such a decree. Weatherford v. James, 2 Ala. 170; Wylie v. Venable, 4 Munf. 369.

CHILTON, J.—It is perfectly manifest that the complainants below were not entitled to a decree. No statute was in existence at the time of the filing of the bill, authorixing them to have an account of the assets, which were wasted, embezzled, or misapplied by the administrator in chief. The administrator *de bonis non*, as the title of his office implies, can only recover such property of a personal character be-

longing to the decedent, as remains unadministered. So in Chamberlain's adm'r v. Bates's adm'r, 2 Porter's Rep. 550, which was afterwards affirmed in Moore v. Armstrong, 9 Porter, 704, it was held, the authority of the administrator *de bonis non* embraced only such assets as remained in *specie*, unaltered or unconverted by the former administrator or executor. The remedy, as indicated by the case last cited, is for the distributees, or creditors, to file a bill in equity against the delinquent administrator, if living, or his representative, if dead, to recover for the waste or conversion of the assets. See also, Willis v. Willis, 9 Ala. Rep. 721, and Price v. Simmons' adm'r, 13 Ala. 749. This bill, so far as it seeks to charge the executor with a devastavit, is clearly without equity.

But there is another, and a fatal objection to the relief sought. The defendant, Steele, pleads that he has made a full and final settlement with the orphans court, of Smith's administration of the assets of the estate, which came to his hands, and the duly certified records of the orphans' court, in which the settlement was had, fully sustains the plea. If then, the orphans' court had jurisdiction to make the settlement, and that jurisdiction attached before the exhibition of the complainant's bill, it is too plain a proposition to require the citation of authority, that the settlement forecloses the complainants, and is a final adjustment of the whole matter in controversy. The well established rule is, that in cases where two courts have concurrent jurisdiction, the court which first takes the cognisance of the cause, retains it to the exclusion of the other. Eaton v. Patterson, 2 Stew. & Por. 9; 16 Mass. R. 171; Ib. 203; 1 Hawks' R. 78; Smith v. McIvor, 9 Wheat. R. 532; 3 Yerg. Rep. 167.

In this case, the orphans' court first moved in the matter of the settlement, on the 12th December, 1837. A settlement was subsequently made, but reversed by this court in June, 1843. Again, on the 29th February, 1844, the record shows, that said Smith having filed his accounts and vouchers for final settlement, the orphans' court ordered the necessary publication to be made for forty days, for all persons interested to attend the final settlement of said Smith's account as executor, &c. on the third Monday in April then next.

On the day appointed, viz: the 15th April, 1844, the final settlement was made, and entered of record, by which it appears that the estate of Jeremiah Smith, deceased, was in arrear with said removed executor, in the sum of $2,351 99. This bill was filed the 5th April, 1844, and the subpœna was not executed until the 12th of July following. The jurisdiction of the orphans' court having first attached, and that court having passed a final decree embracing the subject matter of the bill, in the absence of fraud, or some other special cause for equitable interposition, the chancery court has no right to interfere with the decree, which has thus finally and fully adjusted the rights of the parties. This case is unlike the several cases decided by this court, in which the chancery court was held properly to have taken jurisdiction. See them referred to in Dement et al. v. Boggess's Adm'r, 13 Ala. Rep. 140. For here the complainants have submitted without objection to a final decree, made by the orphans' court, on proceedings instituted before filing their bill, which decree is conclusive, until some cause is averred, and shown, authorizing the chancery court to overhaul it.

But it is insisted by the counsel for the plaintiffs, that upon the removal of Smith as executor, the orphans' court had no power to make with him a decree of final settlement which should conclude them.

This point was expressly decided in Nolly v. Wilkins, 11 Ala. Rep. 872, where it is said, "the orphans' court has power to settle the account of a removed administrator, either on his voluntary application, or on the application of those interested. And that there is no difference as to this question between a removed administrator, and one voluntarily resigning his trust; in either case, we consider it clear, the orphans' court has this power."

These views are decisive of the case before us, and render it unnecessary that we should notice the various other questions made in the argument.

It results, that the chancellor did not err in dismissing the bill. Let his decree be affirmed at the cost of the plaintiffs in error.

McMORRIS v. CRAWFORD ET AL.

1. Where the specific execution of a contract would be decreed, between the original parties to it, it will also be decreed between the parties claiming under them by assignment, or in privity of estate, unless some new equity intervenes, which is insisted on in bar of the specific execution.
2. Where a deed is found in the hands of the grantee, and the possession of the lands conveyed by it, is quietly enjoyed by him, and those claiming under him, for more than twelve years, the presumption of law is, that there was a due delivery of the deed.

Error to the Chancery Court of Autauga county. Before the Hon. J. W. Lesesne, Chancellor.

BILL filed by the plaintiff in error. See the facts fully recited in the opinion of the court.

J. W. PRYOR, for plaintiff in error.

J. E. BELSER, contra.

1. The offer to rescind is too late, the presumptions are against the vendee. Steele v. Kinkle, 3 Ala. 352; Newell v. Turner, 9 Porter, 420; Saddler v. Robison, 2 Stew. 520.

2. John Bradford had a resulting trust in the tract of land, entered in the name of James Bradford; consequently it is not affected by the judgments, against James Bradford, as charged by complainant. Larkin v. Rhodes, 5 Porter, 195; Jack v. Leggett, 7 Wend. 377.

3. The answer denies all the equity of the bill, and particularly the tender of the balance of the purchase money, and there is no proof of this fact produced by complainant. Hunter v. O'Niel, 12 Ala. 37; Reid v. Davis, 4 Ib. 83; Fitzpatrick v. Featherston, 3 Ib. 40; Duncan v. Jeter, 5 Ib. 604.

4. If the vendee did tender the purchase money, and the fact is proved, he should also have tendered a deed, at the same time, before he could ask for a rescission. Wade v. Killough, 5 Stew. & Por. 450; Williams v. Harper, 1 Ala. 502.

5. If the vendor has the title before the purchase money is paid, it is sufficient. Clements v. Loggins, 2 Ala. 514; Harris v. Carter, 3 Stew. 233; Evans v. Bolling, 5 Ala. 551.

6. The deeds being in possession of defendants, this is *prima facie* evidence that they were delivered, and no registration is necessary in such a case. Green v. Yarnell, 6 Mass. 326; Dunn v. Sames, 1 McLean, 321; Hatch v. Haskins, 5 Shep. 391; Lany v· Williams, 1 Shep. 281; Roe v. Neal, 1 Dudley, (Geo.) 168; Doe & Reid, 2 Scam. 371; Mallory v. Stodder, 6 Ala. 801.

DARGAN, J.—In 1836, James Tabor sold to the complainant, a tract of land, consisting of several half quarter sections, and gave bond to make title, when the purchase money should be paid. The complainant gave his note for the purchase money, payable in January, 1839, and took possession, which he has quietly enjoyed ever since. In 1837, Tabor assigned the note to John McNeil, and being about to leave the state, executed a deed in favor of the complainant, to be delivered to him, on the payment of the purchase money.

The complainant paid a portion of the purchase money to McNeil, and being sued by his executors for the residue, filed his bill to enjoin the suit, seeking to rescind the contract, on the ground that Tabor had no title to a considerable portion of the land, and that he had departed this life, insolvent, but offers to pay the purchase money, if the defendant can give a good title.

The answer accepts the offer, and also insists that Tabor had a good title, and makes an exhibit of the deed. From the proof, it is very clear, that Tabor had a legal title to a portion of the land, and the equitable title to the residue. The defendants have procured the legal title to that portion to which Tabor had but an equitable title, and offer to convey to him, and also to deliver the deed signed by Tabor, on the payment of the purchase money.

The rule is, that where the specific execution of a contract would be decreed, between the original parties to it, that it will also be decreed between all parties claiming under them by assignment, or in privity of estate, unless some new equi-

ty in favor of the assignee intervene, and he insists on such equity, in bar of the specific execution of the contract. 2 Story's Eq. 96; 6 John. Ch. Rep. 398; 2 Dick. R. 730.

McNeil being the assignee of the note, and holding the deed signed by Tabor, to be delivered on the payment of the purchase money, could, as the assignee of Tabor, insist on a specific execution of the contract. He was the assignee of the purchase money, with power to deliver the deed, that would pass the legal title. Being the assignee, he can beyond doubt resist the rescission of the contract, and if he can give the complainant a good title, which is all he contracted for, and all to which he is entitled, there can be no reason why the contract should be rescinded, or the complainant relieved from the payment of the purchase money.

It is insisted however, that there is a defect of title in this, that there is not evidence of the delivery of the deeds that constitute the title of Tabor. The deeds are found in the possession of those who claim an interest under them, and who are entitled to their possession. The possession of the land to which the deeds apply, has been held quietly, in accordance with the contract, and the deeds, for more than twelve years. These circumstances are sufficient to authorize the presumption, that the deeds were properly delivered. Flagg v. Mann, 2 Sum. 481.

Inasmuch as the respondents are able to give the complainant a good title, and have been in no default, there is no error in the decree dismissing the bill, and consequently it is affirmed.

BURWELL & CLARKE v. SPRINGFIELD.

1. One partner cannot, without the consent of his copartner, appropriate the assets of the firm to the payment of his individual debts, and such appro-

priation, if made with a knowledge on the part of the person receiving them, that they are the joint property of the firm, is no bar to an action instituted against him by the partnership.

Error to the County Court of Marengo. Before the Hon. James A. Young, Judge.

Action of assumpsit, on the common counts, by plaintiffs, against the defendant in error. Plea, the general issue.

It was proved on the trial, that the defendant was indebted to the plaintiffs, as partners, for work and labor performed in 1842, and that a short time before the dissolution of the firm of Burwell & Clarke, Clarke being individually indebted to defendant, in a settlement with him, paid off his own debt, with the account due by defendant to the firm. The plaintiff's counsel requested the court to charge the jury, that Clarke had no right to appropriate the effects of the partnership to the payment of his individual debts, without the consent of his copartner, Burwell, and that such assent must be proved by the defendant, otherwise the payment proved did not amount to a satisfaction of the claim against Burwell & Clarke. This charge the court refused to give, whereupon the plaintiff excepted, and now assigns it as error.

Brooks & Byrd, for plaintiffs in error.

1. An account raised by one copartner, without the consent or knowledge of the others, cannot be set off against a debt due the firm, and the *onus probandi* of such assent lies upon the creditor of the individual partner. Pierce & Baldwin v. Pass & Co. 1 Por. 232; Rolston v. Click et al. 1 Stew. 526; Lansing v. Gaines and Ten Eyck, 2 Johns. 300; Livingston v. Roosevelt et al. 4 Ib. 251; Dob & Dob v. Halsey, 16 Ib. 34; White v. Toles & Dunlap, 7 Ala. 569; McNeil's Ex'rs v. Reynolds, 9 Ib. 313; Taylor v. Bass, 5 Ala. 110; Jones & Co. v. Jones, 12 Ib. 244.

2. So a joint debt due a partnership, cannot be discharged by one of the partners applying it in payment of an individual debt, owing by him to the debtor of the firm, without the knowledge and approbation of the other members of the concern. White v. Toles & Dunlap, 7 Ala. 569, and cases above

cited. See also, 7 Wend. Rep. 326; Lansing v. Haster, 2 Caine's Rep. 246; Du Boise v. Roosevelt, 4 Johns. 262, n.; Laverty v. Burr, 1 Wend. 529; 3 Kent, 41; Rogers v. Batchelor, 12 Peters, 229; Story on Part. 197, 212; Collyer, 279; Holme v. Karpser, 5 Binney R. 471; Baird v. Cochran et al. 4 Serg. & R. 397; Bank v. Bowen et al. 7 Wend. 158; Boyd et al v. Plumb, Id. 309; Gansvoort v. Williams & Johnson, 14 Wend. 133; Joyce v. Williams, Id. 141; Wilson v. Williams, Id. 146; 19 Johns. 54; Hogan & Co. v. Reynolds, 8 Ala. 60.

Vary, for the defendant in error.

COLLIER, C. J.—It may be regarded as settled, that one partner cannot appropriate the property of the partnership to the payment of his individual debt; and if such an appropriation is made, the party receiving it, is liable to the firm in an action to refund, if he was aware that he received the joint estate. In such case it is said, it makes no difference whether the note of the firm be given, or the partnership property applied to pay the individual debt of a partner. One partner cannot release a debt due to the firm, in order to extinguish his individual liability; nor can a debt due to a partnership be discharged by one of the partners applying it in payment of an individual debt, owing by him to the debtor of the firm, without the knowledge and approbation of the other members of the concern. Dob v. Halsey, 16 Johns. R. 34; Gram & Stewart v. Caldwell, 5 Cow. Rep. 489; Everngham v. Ensworth, 7 Wend. R. 326; Peirce & Baldwin v. Pass & Co. 1 Port. Rep. 232; White v. Toles & Dunlap, use, &c. 7 Ala. 569, and citations in the two last cases. In the present case, the plaintiff, Clarke, appropriated an account due himself and copartner *jointly*, from the defendant to pay a debt which he individually owed the defendant. Here the parties settled their accounts, with a full knowledge of the misapplication of the partnership effects. This settlement cannot be allowed, to the prejudice of the partner who had no agency in, and did not assent to it, and the citations we have made abundantly show, that the ju-

ry should have been instructed, that the defence relied on, could not be supported.

The judgment of the county court must be reversed, and the cause remanded.

GILLESPIE ET AL. V. BATTLE.

1. A vendee of land, under a parol contract, who has given his note for the purchase money, and been let into possession, cannot avoid its payment, on the ground, that the contract is void by the statute of frauds.
2. By the statute of frauds, a parol contract, for the sale of land, is voidable merely, not absolutely void.
3. A vendee of land, who takes and retains possession, under a parol contract of purchase, cannot defeat a recovery on his note, given for the purchase money, on the ground of want or failure of consideration, it not appearing, that the vendor has failed or refused to comply with his contract.
4. Where there is no conflict in the testimony, it is not error in the primary court, to charge the jury, that under the proofs, the defence set up is, or is not sustained.
5. If a defendant has had the benefit of his defence, under the general issue, this court will not reverse the cause, because the court below may have erred, in sustaining a demurrer to a special plea, setting up the same defence.
6. Although the admission of a vendor of land, that he has no title, may furnish a good ground for abandoning the possession and rescinding the contract, yet *the retention* of possession by the vendee, no fraud being shown, estops him from insisting, that the contract is a nullity, and that the note given by him for the purchase money is without consideration.
7. A proposition for a mutual rescission of a contract, assumes its validity, and the proposition being rejected, the parties stand where they did before.

Error to the County Court of Pickens. Before the Hon. Samuel A. Gilkey, Judge.

THIS was an action on a promissory note, by defendant, against plaintiffs in error. Pleas—1. Non-assumpsit. 2.

Fraud. 3. The statute of frauds. 4. Want of consideration. 5. That note was given for land, and that defendant in error promised at the time it was given, to execute a bond for titles, which he has failed to do. The defendant in error took issue on the first and fourth pleas, and demurred to each of the others, and the court sustained his demurrer. A bill of exceptions was sealed at the trial, from which it appears, that the note sued on was given for a tract of land, *virtually* sold, on the day of its date, by defendant to plaintiffs in error, the possession of which the latter took immediately after the sale, and have continued to hold up to the present time: and that some nine or ten months after the maturity of the note, in a conversation between the defendant and Gillespie, one of the plaintiffs, the defendant admitted that he had no title to the land, and that he had shown the land to one Whitehead, with a view of selling it to him, whereupon Gillespie offered to give up the land to defendant upon the surrender of his note, which offer defendant rejected, and stated that he should hold him to his contract. These are all the facts of the case.

In the course of the trial, the plaintiffs offered to prove by a witness, that at the time the note was given, they refused to sign it, unless the defendant would at the same time execute to them a bond for titles, or sign some memorandum of the purchase, and that defendant assured them that a bond should be made and delivered to them in a few days. The court rejected the evidence.

The court charged the jury, "that the defence set up of the statute of frauds was not sustained: that the note upon which the action is founded is a sufficient memorandum to bind the contract on the part of the defendants, and hence that they could not resist the recovery for want of a memorandum of the contract, signed by the plaintiff." Two charges were asked by the plaintiffs in error, affirming in substance the insufficiency of the contract, under the statute of frauds, to authorize a recovery, and a third charge to the effect that if they believed the facts detailed above, the contract was not supported by a sufficient consideration to authorize a recovery; all of which charges the court refused to give.

To the several rulings of the court, to the charge, and to the refusal to charge as asked, the plaintiffs excepted, and now assign them as error.

P. & J. L. Martin, for plaintiffs in error.

1. The demurrer to the third, fourth, and sixth pleas of the plaintiffs in error, was improperly sustained—the fourth being the statute of frauds.

2. The rejection of the testimony offered by the plaintiffs in error, as shown by the bill of exceptions. This testimony should have been admitted under the issues in the case.

3. The note upon which this action is founded, was given to secure part of the purchase money for a tract of land, and is the only written evidence of the contract; this is not a sufficient memorandum to take the case out of the statute of frauds. The court below charged that it was, as is shown by the bill of exceptions. To sustain the ground here stated, see Bates v. Terrell, 7 Ala. R. 129. This case is expressly overruled by the charge of the court below, as the bill of exceptions shows. It is however fully sustained by the cases in 6 Ala. R. 351; 4 Ib. 362; 7 Ib. 814; 7 Ib. 170; and is considered the settled doctrine of this court. The case of Rhodes v. Storr, 7 Ala. R. 346, is not recognized as authority further than the result—the reasoning, and grounds stated, are not considered correct.

4. The refusal to charge as requested, in regard to the want or failure of consideration, and the charge given, are relied on. In each the court below erred.

E. W. Peck, contra, refers the court to the following authorities: Rhodes, adm'r, v. Storr, 7 Ala. Rep. 347, 348; Worthington, adm'r, v. McRoberts and Porter, Ib. 814, 816; Johnson v. Hanson, 6 Ib. 351, 352; Cope v. Williams, 4 Ib. 362; Howard v. Easton, 7 Johns. Rep. 205, 206; Dowdel v. Camp, 12 Ib. 451.

Sheriff sales and judicial sales, and sales at auction, are within the statute of frauds. Jackson v. Catlin, 2 Johns. R. 259; Ennis v. Waller, 3 Blackf. 472; Hutcheson v. Moses, 3 Dana, 229.

In this case, the sale was made by the defendant as administrator.

The plaintiff in error not having rescinded the contract by abandoning the possession—nor put the defendant in error in default by offering to pay the money and demanding a title, cannot resist the payment of the note—by refusing to put an end to the contract, he is to be held as affirming the contract, and must consequently be bound to pay the money.

CHILTON, J.—The main question in this case is, whether the plaintiff in error can defend against a promissory note given in part pay for a tract of land, upon the ground that there was no note or memorandum of the sale executed as required by the statute of frauds. It appears that the contract for the sale of the land was by parol; that the purchaser took possession of the premises under the contract, and still retains it, and the only writing which passed between them is the note now in suit, which was given for a part of the purchase money.

The note is made payable to "Alfred Battle, Adm'r," &c., but it does not otherwise appear that it was not given to him in his individual right.

Our statute of frauds declares, that no action shall be brought whereby to charge any person upon any contract for the sale of the lands, tenements, or hereditaments, unless some note or memorandum of such contract shall be in writing, and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorized.—Clay's Dig. 254, § 1.

It is conceded, that if the plaintiff below had instituted his suit upon this contract, which, as we have stated, was verbal only, that the case would come within the statute. But it is insisted that this action is not brought upon a contract for the sale of land. That the plaintiff relies for his recovery upon the written promise of the defendant to pay him so much money, and that the defendant, having received the land, and enjoyed the rents and profits, should not be allowed to set up the statute in bar of a recovery, especially as the plaintiff has never refused to convey, according to his parol undertaking.

To sustain this position, the counsel has referred to several decisions of this court, and as there is an apparent conflict, at least in the reasoning of two of them employed by the judges in delivering the opinions, we propose to examine them with some particularity. It is of the last importance, that decisions of the court, under which rights may be presumed to have vested, and on which parties rely in their business transactions. as securing to them remedies, should be stable and unshaken, and they should never be disturbed unless some overruling necessity requires a departure from them.

But to our decisions. In Cope v. Williams, 4 Ala. Rep. 362, it was held, that a purchaser of land under a parol contract, who had paid a portion of the purchase money, and retained the possession, could not, pending his uninterrupted possession, maintain an action against the vendor to recover back the money which he had paid. It was said by the Chief Justice, in delivering the opinion, that "morality forbids the idea, that one man should take possession of another man's property, under a contract, which at most is *merely void*, and notwithstanding its continuous enjoyment, refuse to make for it any remuneration." It also appeared in that case, that the vendor had never refused to comply with his contract, and some stress was laid upon this fact, to show that the claim of the plaintiff was against equity and good conscience.

The next case was Johnson v. Hasnon, 6 Ala. Rep. 351, which was an action by the vendor against the purchaser of land under a parol contract, and who had taken and retained the possession, and paid a portion of the purchase money, to recover the balance due for the land; the plaintiff averring willingness and readiness to perform the contract on his part. It was held the plaintiff could not recover, because of the statute of frauds, and it was said that the difference between that case and Cope v. Williams was this, that in Johnson v. Hanson, the vendee had repudiated the contract, and although he retained the possession of the land, it was not by force of the contract, but by permission of the opposite party.

This case was followed by Bates v. Terrell, 7 Ala. R. 129, in which it was held, that if the vendor's contract is void by the statute of frauds, the vendee may avoid the payment of

the money agreed to be paid, although he has given his promissory note for the amount. The C. J. in delivering the opinion, remarks, that a contract for the sale of land, and which is not evidenced by writing, is merely void, the performance of which the vendor cannot enforce; or even recover damages for its breach, and that the retention of possession in such cases cannot estop him; for the reason that there is no valid contract to cause such an act to operate. It is also further said, that the taking a promissory note can make no difference, and will not place the vendor in a more favorable position.

It is proper to remark here, that there were other points involved in the case last referred to, upon which it necessarily turned. This point, though raised by the record, was not necessary to a determination of the cause, inasmuch as a bond for title had been executed, and improperly excluded by the court below. It may be that this point therefore received but a casual examination.

In the subsequent case of Rhodes' Adm'r v. Storr, 7 Ala. 346, it was held, that the vendee could not avoid the payment of a note given upon a parol purchase of land, on the ground that the contract was void by the statute of frauds. This decision proceeds upon the ground, that the contract is executed, so far as the defendant is concerned, and that so long as the vendor was able and willing to perform every thing which in good conscience he was bound to do, the vendee could not be heard to complain, as he had never put the vendor in default by a demand for title. This case affirms the doctrine of Meredith v. Nash, 3 Stew. Rep. 207, and is referred to without disapprobation in Worthington, adm'r, v. Porter & McRoberts, 7 Ala. 814, which is the last decision upon the subject.

From these several decisions it would seem very clearly to follow, that where the action is brought to recover upon the parol contract, it cannot be sustained, even though there has been a partial execution of it; for in such case the statute is directly involved, and it declares the action not maintainable. But as the cases of Bates v. Terrell and Rhodes v. Storr, seem to indicate a different rule in respect to cases situated

like the present, and we are called upon to adopt the principle settled by the one or the other, we will briefly state our reasons for giving our preference to the conclusions attained in the last named opinion.

The statute of frauds does not render a contract absolutely void, but voidable merely. It was enacted for the benefit of defendants. 3 Monroe's Rep. 170; 2 J. J. Mar. 563; Clay's heirs v. Marshal's heirs, 5 B. Monroe, 272; see also, Patterson et al. v. Ware, 10 Ala. 444; Ib. 400.

It has introduced no alteration in the mode of pleading, either at law or in equity. It only applies to, and affects the evidence necessary to support the contract, requiring written evidence, whereas, by the common law, parol proof sufficed. This is a well settled and familiar principle. 4 Litt. R. 341; 2 J. J. Mar. 548.

Keeping in view these principles, a brief reference to the mode of proceeding upon this contract, will aid us in ascertaining the true character of the defence set up. The plaintiff declares upon the note, which is an unconditional written promise by the defendant, to pay him so much money at a stated time, and this note imports a consideration. After reading this to the jury he closes his case. The defendant says, the plaintiff ought not to recover, because the note was given *in consideration* of a parol promise made by the plaintiff, to convey to him a certain tract of land, and that inasmuch as the law gives him no remedy to enforce that parol promise, it cannot be said in a legal sense to have any value; therefore his undertaking, as evidenced by the note, is without consideration, and the plaintiff should not recover. It would seem to result from this mode of procedure, that the statute, when set up as a defence to an action upon the note, affects the consideration only, and not the contract otherwise. This point was expressly decided in Edelin v. Clarkson's executors, 3 B. Monroe's Rep. 31. In that case the court held, that a plea averring "the note sued on was given in consideration of a sale of land, not evidenced by writing," was not a plea setting up the statute of frauds, but was a plea of the want, or failure of consideration. To hold in such cases, that the statute applies to the contract declared on, so as to render it inoperative, irrespective of the consideration, would

involve us in the dilemma of avoiding the note for the purchase money, even though the plaintiff, after receiving the note, had gone on and fully complied with, and executed his contract, by delivering a deed for the land. No one, I apprehend would contend, that in such case the plaintiff could not recover upon the note. But would it not be a solecism to hold, that the action was obnoxious to the statute of frauds, since the plaintiff declared *upon a note in writing, evidencing the terms of the contract, and signed by the party to be charged thereby.*

This view of the case disposes of the plea of the statute of frauds, as a bar to the action, and we proceed to consider the effect of the statute, as applicable to the consideration of the note.

It appears there has been a part performance of the parol contract on the part of the plaintiff below, in that he delivered to Gillespie the possession of the land under the contract, which possession has been retained by him ever since. Now although at law, part performance of a parol contract for the sale of land will not take the contract without the statute, in equity it does. And it is very clear in this case, that if Gillespie had paid the purchase money and taken possession under the contract, equity would not permit the vendor to turn him into a trespasser upon the land, but would specifically execute the contract. 2 Story's Eq. Juris. § 761-2-3.

It cannot be said then, that the consideration has wholly failed, since the defendant has derived, and continues to enjoy, an essential benefit, conferred by the contract, and since the plaintiff has placed himself in a condition which enables the defendant, upon payment of the purchase money, to enforce a specific execution of the agreement in a court of equity. The plaintiff has parted with the possession of his land, which is a detriment to him, trusting for his compensation to the note he has received. To hold that this detriment to the promisee, and benefit to the promissor, does not constitute a good consideration to support a promise, would violate the plainest principles of law. 5 Cranch, 142; 2 Peters, 182; 15 Ib. 290.

But I would inquire, how is it that the consideration can be said to have failed, when the defendant has received and

holds, without molestation, all that he contracted for? The plaintiff has never refused to give him the proper written evidence of the contract. He has never demanded it, and has never put the plaintiff in default. I confess then, that I cannot conceive how any court of justice should permit him to cleave to all the benefits of the contract, and at the same time make his own violation of it, the ground for withholding the purchase money. If such construction of the statute be allowed, then indeed was it rightly yclept "the statute of *frauds*," albeit, not for their prevention, but the contrary.

The consideration of the note is the possession of the land coupled with a parol contract for the conveyance of title in future. The defendant has, as I have said, the possession, and the contract to convey remains unimpaired by any act of the plaintiff. The agreement is lawful, and each party claims the benefit of it—the plaintiff by demanding the purchase money, the defendant by holding on to the land. Under such circumstances, to hold that the contract constitutes no consideration for the note, would be virtually to hold the parties incompetent to contract. See 21 Wend. 626. I will not undertake now to decide, what would be my opinion in regard to the defence, had the defendant never taken possession of the land, or had he abandoned the possession upon the refusal of the plaintiff to comply with the stipulations of the contract on his part. I desire to limit my opinion to the law as applicable to the facts of this case. The propriety of this becomes the more obvious, as the Chief Justice does not sit in the cause.

The views which I have expressed above, are conclusive of the case, and although I may be in error, I have the consolation to believe, that they are not only sustained by reason, but by the decision of this court in Rhodes v. Storr, *supra;* and substantially by Lord Ellenborough, in Crosby v. Wadsworth, 6 East, 602. See also, Sims v. Hutchins, 8 Sm. & Mar. Rep. 328; 6 Verm. Rep. 69; Ib. 383; Edlin v. Clarkson, 3 B. Monroe's Rep. 31; 13 Johns. Rep. 359; Cope v. Williams, *supra;* 4 Dal. 152; 1 Binn. 450, 378; 2 Rawle, 53; 5 Litt. 94; 7 Watts, 530. Wherever the purchaser has executed the contract on his part, he shall not be allowed, so long as he retains the possession of the land, under the con-

tract, and the vendor is in no default, to treat it as a nullity; and as it constitutes a consideration for money paid by him to the vendor, so it is a sufficient consideration to support an action upon the note against him.

The whole proof is set out in the record. There is no conflict in the testimony, and the established rule in such case allows the court to charge the law as applicable to the facts, without hypothesis. He might well have charged, as he substantially did, that under the whole proof the defence was not sustained.

No injury then could possibly have resulted to the defendant from the charges, and it becomes unnecessary for me to go into a particular examination of them.

In regard to the several pleas to which demurrers were sustained, it is only necessary to remark, the defendant had all the benefit of them under the general issue, and not having been injured, he cannot complain.

That Battle admitted he had no title at one time, and that he proposed to sell at another to a different person, cannot relieve the defendant from liability. We must presume the defendant knew the state of his title when he contracted with him, as no fraud is shown; at most, this admission and conduct of Battle would have furnished the defendant grounds for abandoning the possession, and rescinding the contract, but this he would not do, and retaining the possession, he is estopped from saying the contract is a nullity, and constitutes no consideration for the note. The same reasoning is equally fatal to all benefit which could possibly have accrued from the admission of the testimony of Hardwicke.

Neither is the defendant benefitted by his proposal to deliver up the land upon the condition that the plaintiff would surrender to him the notes. This proposition for a mutual rescission, assumes the validity of the contract proposed to be rescinded, and being rejected by the plaintiff, the parties remained precisely where they were.

I have examined all the points made in the case, with care, and the main point at greater length than I should have done, but for the fact that the decisions bearing upon the case, appear not altogether to harmonize. I feel constrained according to my view of the law, to pronounce that there

is no error in the record, and the judgment is consequently affirmed.

COLLIER, C. J., not sitting.

DENT v. SMITH.

1. Property being levied on by virtue of an execution against the executors of L, and claimed by D, in virtue of a trust executed to him by L, in his life time, a plea by the claimant, that the estate of L had been declared insolvent, and that the judgment on which the execution had issued, had not been filed in the office of the clerk of the orphans' court, within six months after the decree of insolvency, and that on the settlement of the estate, the claim was rejected for that cause—is bad.
2. A claimant in the trial of the right of property, who derives his right from a deed of trust in which he is a trustee, must rely on the title thus derived, and will not be permitted to prove, that independent of the deed of trust, and long before it was created, his *cestui que trust* was the owner of the property conveyed by the deed, by gift from the donor.
3. When a trial of right of property has been had, it cannot be assigned for for error, that no issue in writing was made up previous to the trial.

Error to the Circuit Court of Tuscaloosa. Before the Hon. Thomas A. Walker.

THE facts of this case, which was a trial of a right of property, may be thus stated: The defendant in error, commenced suit against Charles M. Lewen, and Mary Lewen, executors of Charles Lewen, deceased, and whilst the suit was pending, an ancillary attachment was sued out, and served on the slaves in controversy, and also on other property. The slaves were claimed by the plaintiff in error, as trustee of Elvira Thomas. Judgment having been rendered in favor of the defendant in error, against the executors of Charles Lewen, deceased, execution issued thereon in the

year 1843, and was levied on the same property attached, which was claimed by Dennis Dent, trustee, and a bond given to try the right of property. The cause seems to have been continued until the March term, 1846, at which term the claimant interposed a plea, *puis darrein continuance*, setting forth, that Mary Lewen, the acting executrix, had in the year 1844, duly represented the estate of Charles Lewen, her testator, to be insolvent, to the orphans' court of Tuscaloosa county, and that said estate had been duly declared, and decreed to be insolvent by said court, on the first Monday in July, 1845. That the judgment on which this execution issued, was rendered in 1843, and that it had not been filed with the clerk of the orphans' court of Tuscaloosa, within six months after the decree of insolvency of said estate, verified in the manner prescribed by the act of 1843; and that on the settlement of said estate, the judgment was rejected by the orphans' court, and the assets decreed to be distributed amongst the other creditors who had filed their claims, in the manner prescribed by the act. To this plea the plaintiff in execution demurred, and the demurrer was sustained. Upon the trial of the issue, a bill of exceptions was sealed by the presiding judge, which shows, that the claimant, to sustain his claim, read as evidence a deed for said slaves, executed by Charles Lewen, deceased, bearing date the 24th January, 1840, whereby he conveyed said slaves, in consideration of love and natural affection, to the claimant, in trust for Elvira Thomas, the daughter of the grantor, which deed was duly recorded.

The claimant also introduced several witnesses, who testified, that the slaves which were found subject to the execution, were mother and son; that they had lived neighbors to Charles Lewen, the grantor, but had never known him to be in possession of said slaves, but had always seen them in possession of the husband of the *cestui que trust;* and for the space of fifteen years the said slave, Martha, had been in the possession of Armistead Thomas, and his family, during which time, Henry, the son, was born. That Lewen, the testator, had been considered solvent, and very punctual up to his death; and although his estate had been declared insolvent, it had resulted more from the bad management of

his representatives, than any thing else. It appeared, that the debt on which the execution issued, was contracted by Charles Lewen, before the execution of the deed of trust. It was also shown that Thomas had been insolvent for about twenty years, during all which time the slave Martha had been in his possession, and that of his family. On this evidence, the claimant requested the court to charge, that if Thomas and his family, had been in the possession of Martha for twenty years, and of Henry from the time of his birth, and that during this time, neither Lewen, nor his representatives, had ever claimed said slaves, that then said slaves were not subject to said execution; which charge the court refused, but charged the jury, that the claimant could not, to defeat the levy, set up title in another. The claimant also requested the court to charge the jury, that if the deed of trust executed by Charles Lewen in 1840, was but the satisfaction of a gift, made twenty years ago, and intended to confirm, and state the intention of it, that then the slaves were not liable to the execution; which the court refused.

Before the trial commenced, the claimant moved the court to dismiss the whole proceedings, because no attachment could issue against the representatives of a decedent; which motion was refused, both when made by claimant, and by counsel as *amicus curiæ*. A verdict subjecting the slaves to the execution of the plaintiff, and judgment being rendered, the claimant assigns for error—

1. The court erred in sustaining the demurrer to the plea, *puis darrein continuance.*

2. The court erred in proceeding further, after the estate had been declared insolvent.

3. The court erred in rendering a judgment on the verdict, there being no issue made up, as required by the statute.

4. The court erred in refusing the charges requested by the claimant.

5. The court erred in not dismissing the proceedings upon the motion made by claimant.

B. F. Porter and S. D. J. Moore, for plaintiff in error.

1. The court should have quashed the whole proceeding, as an attachment will not lie against a deceased person's es-

tate. Wyman et al. v. Wyman, 1 Harper, 125; 2 Dallas, 73; 1 Johns. Cas. 372.

2. The records of the orphans' court were offered to show that, that tribunal had acted on the debt, and rejected it. The execution was therefore discharged; and evidence of this proper.

3. There was no pretext upon which to make the property liable as part of the estate of Lewen. That estate had neither property nor possession in it. Without the deed, the possession of Thomas for three years, made it his; and the deed was but a confirmation of a gift long made, accompanied with delivery. Gay v. Mosely, 2 Munf. 543; Myers v. Peek's adm'r, 2 Ala. R. 658, 659; McCutchen v. McCutchen, 9 Porter, 649.

4. It could not be a fraud upon Lewen's creditors, because, though the debt was owing before the date of the deed, the title under possession, was long before vested in Thomas. Whether the deed can so control this possession as to vest the estate in Thomas's wife, by relation to the original object of the gift, is a matter between Thomas's creditors, and his wife's trustee. Thomas and Howard v. Davis, 6 Ala. R. 113; Hill and Hill v. Duke, Ib. 259.

E. W. Peck, and J. & P. Martin, contra.

1. The claimant cannot contest the validity of the judgment, or regularity of the execution. Harrell v. Floyd et al. 3 Ala. 18.

2. The claimant cannot set up title in a third person. McGrew v. Hart, 1 Porter, 183.

3. The matter pleaded, *puis darrein continuance*, is no defence in this case. The property sought to be subjected to execution having been conveyed by a voluntary deed by the defendant in execution, &c., although subject to plaintiff's execution under the statute of frauds, could not be taken by the administrator as assets, and consequently could not be affected by the decree of the orphans' court. Marler v. Marler, 6 Ala. 369. Dent was a stranger to the decree, and not bound by it in any way, and consequently could not plead it against the defendant in error. Again, even if this suit had

been against the administrator, the decree of insolvency would not have abated the suit. Clay's Dig. 195, § 13. It was not necessary for the creditor in this case to file his judgment under the tenth section of Clay's Digest, p. 194. It was a judgment which had been recovered against the administrator; but if it was, and not done, it could not affect him as to this property—it would only prevent him from taking a dividend under the decree, &c.

4. The evidence of the proceedings in the orphans' court was rightly rejected, for the reasons given in the last point.

5. By the plea *puis darrein continuance*, the plaintiff in error abandoned all his other defences.

6. There is no error in the charges of the court.

DARGAN, J.—We will first examine, whether the court erred, in sustaining the demurrer to the plea filed by the claimant, setting forth the decree of insolvency of the estate of Charles Lewen, against whose executors the judgment was rendered, on which the execution levied on the slaves, was issued. In the case of Betts v. Taylor, 8 Porter, 564, this court said, that on the trial of the right of property, levied on by execution, the plaintiff need not produce the judgment on which it was issued, nor can the claimant be permitted to litigate its justice, or to show that the defendant in execution was dead at the time it issued. And in the case of Fryer v. Dennis, 2 Ala. 144, it was said, that a claimant of property levied on by execution, cannot object to irregularities either in the judgment, or execution. In Harrell v. Floyd, 3 Ala. 16, this court held, that on the trial of the right of property, the claimant could not question the validity of the judgment, or the regularity of the execution, and to the same effect is the case of Collinsworth v. Horn, 4 Stew. & Por. 237, and also Perkins and Elliott v. Mayfield, 5 Porter, 182.

These decisions sufficiently show, that the claimant of the property, on the trial of the right under the statute, authorizing such trial, cannot be permitted to assume the position of the defendant in execution, and to contest its justice, or regularity. The only question that can be tried, is, whether the property is liable to the execution. The claimant cannot show, on this trial, that the judgment was obtained by fraud,

or that it has been paid, or otherwise discharged. These authorities show, that the court did not err in sustaining the demurrer to the plea *puis darrein continuance.* But independent of this view, this court held, at the last January term, that the statute of 1843, (Clay's Dig. 194,) requiring all claims to be filed in the clerk's office, within six months from the time such estate shall be declared insolvent, was intended merely to operate as between the creditors of such estate, and to give a preference to those creditors, who should file their claims in the manner prescribed by the act, over those who failed to do so; but that a failure to file the claim with the clerk, under this act, would not operate as an extinguishment of the debt, in favor of the administrator, or distributees, if there be a surplus left, after the payment of the claims filed, according to the provisions of the statute. The judgment then, as against the distributees, was not discharged, and could not be enforced, against property liable to creditors, but which could not be treated by the executor as assets, or subjected by him to the payment of debts; for the statute referred to, can operate only on the assets of the estate, which can be treated and administered as such, by the executor or administrator. The judgment then, on which the execution issued, was not discharged, or satisfied, by the failure of the plaintiff to file it, as required, in the orphans' court, after the estate of Charles Lewen was declared insolvent. It was only postponed, in reference to the assets of the estate, in favor of such creditors, as had filed their claims; and as the property levied on, whether liable to the execution or not, cannot be said to be assets of the estate, because by *no possibility* can those slaves be claimed, or reduced to possession, by the executors of Charles Lewen. If therefore, it were even competent to show, that by matter subsequent to the levy of the execution, and the interposition of the claim, the execution has been discharged, the facts set forth in the plea were insufficient for this purpose; for notwithstanding the decree of insolvency, and the failure to file the judgment in the orphans' court, the plaintiff in execution may still proceed to subject such property, as is liable to creditors, but which cannot be treated as assets of the estate.

The next question we propose to consider, is the charge of

the court, and the refusal to charge as requested. The rule is settled by the decisions of this court, that a voluntary conveyance by a debtor, is void as against his creditors, who are then such. See Miller v. Thompson, 3 Porter, 196; Cato v. Easly, 2 Stew. 214; 2 Ala. 648; Moore v. Spence, 6 Ala. 506. These decisions fully show, that if Charles Lewen, the grantor, was the owner of the slaves at the time he executed the deed to Dent, as trustee for his daughter, Mrs. Thomas, the deed was void as against the plaintiff in execution, whose debt then existed, although the deed was valid as against the grantor, and his representatives.

To avoid the effect of this principle of law, the plaintiff in error contends, that at the time of the execution of the deed, the slaves in fact belonged to Mrs. Thomas, in whose possession Martha had been, for twelve or fifteen years before the execution of the deed; and her son from the time of his birth.

It must be true that Charles Lewen either had title to the slaves at the time the deed was executed, or he had *none*. If he had title, the deed is void as against the plaintiff in execution, whose debt then existed; if he had no title at all, he could convey none by his deed to the claimant, and if the deed conveyed no title to Dent, because the grantor had no title to convey, the claimant cannot insist on the title either of Mrs. Thomas, or her husband, to defeat the execution. McGrew v. Hart, 1 Porter, 175. If we were to permit a claimant, to interpose the title of a third person to defeat an execution, it would be to permit one man to redress the wrongs done to another, and thus to take charge of his rights, in which the claimant had no interest. If this could be done, the title of the third person would be bound by the decision, and hence the right, and title of the owner in fact, would be bound by a proceeding to which he was not a party. This view fully vindicates the propriety of the decision in the case of McGrew v. Hart, and shows, that the claimant in the trial of the right of property, must rely upon his own title, and cannot be permitted to insist on title in another, to which he is *a stranger*. The charge of the court was also correct. The court also properly refused to give the charges requested, for if Dent received any title by the deed, or if

Lewen had any to convey, the deed was void as against the plaintiff; and if Lewen had no title at the time the deed was executed, Dent took none by the deed, and if he took no title by the deed, he cannot be permitted to assert the rights of others, who cannot be affected by the proceeding, in this suit, to which they are not *parties*.

The only remaining question under the view of the law here taken, is, will this court reverse the judgment, rendered on a verdict, in the trial of the right of property, because no formal issue was made up in writing. Either party had the right in the court below, to insist, that the issue should be made up in writing, which the jury was impanneled to try; but if this was not done, and the parties went to trial as if it had been done, neither party can assign in this court for error, that the issue was not made up.

In the case of Lucas v. Hitchcock, 2 Ala. 287, the judgment entry showed that the parties appeared, and a verdict on the issue joined was rendered, but no formal issue was found in the record. This court presumed the issue was properly made up, although not found in the record, and refused to reverse the judgment. Whether the issue in fact was reduced to writing, and filed, as part of the record, we hold to be immaterial. The parties had the right before going to trial to insist, that the issue should be so made up; if this was omitted, or waived, or not insisted on in the court below, it cannot be assigned in this court for error.

There is no error in the record, and the judgment must be affirmed.

NABORS v. SHIPPEY.

1. *A verbal promise*, made to an agent, to pay the amount of an execution, in favor of the principal, which has been levied on property of the defendant, in consideration that the agent will release the levy—does not authorize an action against the promissor, in the name of the agent.

2. Where an agent declares *in the common counts*, on a promise made to him for the benefit of his principal, the plea of non-assumpsit puts in issue the right of the agent to maintain the action in his own name.

Error to the Circuit Court of Pickens. Before the Hon. S. Chapman.

This was an action of assumpsit, instituted by defendant in error, as the agent of one John Kirby, against the plaintiff in error, in a justice's court, and taken by appeal to the circuit court. The statement, or declaration, was on the common counts. Plea, non-assumpsit. By the bill of exceptions, it appears, that defendant in error was the known agent of Kirby, and had been such for some time; that an execution in favor of Kirby had been levied on the property of one George Branch, the defendant therein, and that defendant in error, as the agent of said Kirby, on the undertaking of plaintiff, *verbally*, to pay the debt, released the levy. The debt not having been paid, the defendant, in his own name, as the agent of Kirby, sued the plaintiff, to recover the amount thereof.

The court was requested by plaintiff in error, to charge the jury, that the action could not be maintained, on this this state of facts, in the name of defendant in error. although he was described in the pleadings as the agent of Kirby, but that it should have been brought in the name of Kirby, the principal. This charge the court refused to give, but charged the jury, that if there was any force in the objection, it came too late, the plaintiff in error having gone to trial on the general issue. To the refusal to charge as requested, and to the charge given, the plaintiff in error excepted, and now assigns them as error.

Huntington, for plaintiff.

B. F. Porter, contra. The objection came too late, as to the agency of Shippey. The general issue admitted the capacity of the plaintiff to sue, and a good declaration. Brewer v. Strong's Ex'rs, 10 Ala. 961.

If an agent has an interest in the matter of the contract,

he may sue; for instance, commissions. 1 Chitty's P. 4, 5, 7, 8; Potter v. Yale College, 8 Conn. 60. Besides, it was only *descriptio personae.* Buffum v. Chadwick, 8 Mass. 103. See also, Newbold's Ex'r v. Wilson, Minor, 12.

COLLIER, C. J.—Ordinarily, an agent contracting in the name of his principal, is not entitled to sue, nor can he be sued on such contracts. Thus an agent selling goods for his principal, and in the name of the latter, cannot maintain an action for the purchase money. Where A agreed in writing to pay the rent of certain tolls, which he had hired for three years, of certain commissioners for drainage, "to the treasurer of the commissioners:" *Held,* that the promise was to the commissioners, to pay the rent to the person whom they should appoint from time to time to receive it, and that an action was maintainable by the treasurer in his own name. Piggott v. Thompson, 3 Bos. & Pul. Rep. 147; Ewing v. Medlock, 5 Port. Rep. 82; Sargeant v. Morris, 3 B. & Ald. Rep. 276; Bowen v. Morris, 2 Taunt. R. 374.

The cases in which the agent has personal rights, and may maintain an action on a contract, in which his principal is interested, are thus stated. "First, where the contract is made in writing, expressly with the agent, and imports to be a contract psrsonally with him, although he may be known to act as an agent. Secondly, where he is the only known or ostensible principal, and therefore is, in contemplation of law, the real contracting party. Thirdly, where by the usage of trade, or the general course of business, he is authorized to act as the owner, or as a principal contracting party, although his character as agent is known. Story on Ag. § 393. The facts recited in the record, do not bring this case within an exception to the general rule, which declares, that an agent shall not sue on contracts made by him in the name, and on the behalf of the principal. The contract was verbal, the consideration for the defendant's promise was the release of property which had been levied on to satisfy a judgment in favor of the principal, as the defendant very well knew. Upon principle, as well as authority, this promise inured to the principal, and he alone could sue for its breach.

A demurrer to the statement would not have been sustain-

ed—the statement, being a mere condensation of the common counts in assumpsit, might have been supported by a promissory note, or perhaps other writing indicating a promise to the plaintiff, as the agent of Kirby, *in totidem verbis.* The plea of *non assumpsit* put in issue the right of the plaintiff to maintain his action, and devolved upon him the burthen of making it out by proof adapted to his allegation. This was not done by showing, that the defendant was indebted to Kirby on a promise made to the plaintiff, as his agent. The circuit court ruled the law adversely to this view—the judgment is consequently reversed, and the cause remanded.

ELLIS ET AL. V. ELLIS'S ADMINISTRATOR.

2. A will containing the following clause: "I hereby will and bequeath unto my beloved wife, Catharine M. Ellis, my whole estate, real and personal, after the payment of my just debts, *recommending to her, at the same time, to make some small allowance, at her convenience, to each of my brothers and sisters; say to each one thousand dollars,*" does not create a trust in favor of the brothers and sisters of the testator.

Error to the Chancery Court of the 22d District. Before the Hon. W. W. Mason, Chancellor.

THIS was a bill filed by the plaintiffs in error, the brothers and sisters of Harvey W. Ellis, deceased, against the defendants, to enforce the trust which they alledge was created in their favor by the following clause of the last will and testament of said Harvey W. Ellis: "I hereby will and bequeath unto my beloved wife, Catharine M. Ellis, my whole estate, real and personal, after the payment of my just debts, recommending to her, at the same time, to make some small

allowance, at her convenience, to each of my brothers and sisters; say to each, one thousand dollars."

The will was written, and signed by the testator, but was without witnesses attesting its execution.

The chancellor dismissed the bill for want of equity, which is now assigned as error.

B. F. Porter, for the plaintiff in error.

1. The words used are ample to raise a legacy, or trust.—Harding v. Glenn, 1 Atk. 470, note 1; Malin v. Keighley, 2 Ves. jr. 333, 335, note 1; Tibbits v. Tibbits, Jacob, 148, 19 Ves. jr. 663; Brown v. Higgs, 8 Ves. jr., 561; Parsons v. Baker, 18 Ib. 476; 2 Story's Eq. § 1068, 1069. The court sits not for the purpose of establising a new rule, but to declare one already made. Per Lord Nottingham, in Cook v. Fontaine, 3 Swans. 600. The rule of construction is admirably expressed in a late case. The testator must be taken to have meant something beyond that which would have taken place had he said nothing. Godkin v. Murphy, 7 Jurist, 506; Spence's Eq. Jur. 529.

2. The complainants are not forced to election in such a case. The doctrine of election rests on some words indicating it in the will. Here there are none. 2 Wms. on Ex'rs, 887, 888; 1 Jarman on Wills, 390; 1 Swanst. 406; 3 Atk. 715; Hilliard v. Burford's heirs, 10 Ala. 977; Warley v. Warley, 1 Bailey's Eq. 398; Tibbits v. Tibbits, 19 Ves. jr. 664.

3. The debts rest upon the personal estate not specially devised—not upon the realty. Warley v. Warley, 1 Bailey, 398; Donne v. Lewis, 2 Bro. C. C. 263; Harmond v. Oglander, 8 Ves. jr. 124; Dunlap v. Dunlap, 4 Dess. 329; Ancaster v. Mayer, 1 Bro. C. C. 462.

Ormond and Peck, for the defendant in error, made the following points:

1. The will does not create a trust upon Mrs. Ellis which a court of chancery will enforce, because, although it be true that words of recommendation, or expressive of hope, or desire, may be sufficient to create a trust, yet if it is obvious

that the language was not used imperatively, but that a choice was given to the legatee to perform, or not to perform, the recommendation, at his option, this court will not deprive him of it. See the general doctrine in, 2 Story's Eq. 328, § 1068; Malim v. Keightly, 2 Ves. jr. 335; Sale v. Moore, 1 Sim. 534; Meredith v. Haneage, Ib. 542; Curtis v. Rippon, 5 Maddox, 434, 3d Am. ed. 263; *Ex parte* Payne, 2 Young & Coll. 36; Wright v. Atkins, 1 Turner & R. 157; Knight v. Knight, 3 Beavan, 148; Bardswell v. Bardswell, 9 Sim. 320; Pope v. Pope, 10 Id. first case; Wood v. Cox, 2 Myl. & C. 684; Hill on Trustees, 71; 1 Jarman on W. 332.

2. If we are wrong in this view, and the words of the will are considered sufficient to raise a trust, then we contend this is a case in which the heir should be compelled to elect, whether he will take under the will, or as heir at law. The present state of the English law seems to be, that an unattested will of realty cannot be read against the heir, unless the legacy is given to him expressly on condition to give up the real estate. See Story's Eq. 357, note 3; Lord Eldon's opinion in Sheddon v. Goodrich, 8 Ves. 497; Sir Wm. Grant in Brodie v. Barry, 2 V. & B. 130, and Lord Kenyon, in Cary v. Askew, 1 Con. 244; but the rule does not apply where the land is *copy hold.* All these judges confess themselves unable to understand the distinction, and condemn the rule. It is an insult to common sense to say, that your Honors cannot read that portion of this will which relates to land, because it is not attested. See Nutt v. Nutt, 1 Freeman's Ch. 128, where the contrary is held.

3. But conceding that Mrs. Ellis could not compel the heirs to elect, whether they would take under the will, or as heirs at law of the testator, that is not the aspect of this case. This bill is filed by the heirs at law, to enforce a trust—and this court, sitting as a court of chancery, will not compel its enforcement, unless the party asking its aid will himself do justice. Now it is most apparent, that the testator did not intend that the complainants should take his land and the legacy, for if this is an imperative command, most assuredly the land and the slaves were the means by which he expected his wife would be enabled to pay them, for he left her no money, but on the contrary a large debt to pay, which has

just been extinguished. A court of equity then, will refuse its aid, unless the complainants will themselves do justice. This is a familiar principle of equity, and it is only necessary to mention the case of a husband applying to a court of equity to obtain his wife's portion—he will be required to make a settlement on her, or the court will not interpose. So if one goes to that court to get rid of usury, he must offer to pay the debt, and interest, or its doors are closed against him.

4. In none of the cases in which words of recommendation are construed to raise a trust, was the will defective. There is a manifest and plain absurdity in raising a trust in favor of a party who, by his own act, is preventing the trustee from acquiring the property on which the trust is to be charged.

5. This suit is premature as the estate has not been settled, and is still in the hands of the administrator. But as the parties desire the questions of law to be settled, this goes only to the costs.

CHILTON, J.—The will of H. W. Ellis, which we are called upon to construe, is in these words: "The State of Alabama, Tuscaloosa county—Believing it to be the duty of every one to make a disposition of their estate by will, I hereby give and bequeath unto my beloved wife, Catherine M. Ellis, my whole estate, real and personal, after the payment of my just debts, *recommending her, at the same time, to make some small allowance, at her convenience, to each of my brothers and sisters; say to each, one thousand dollars.* In testimony whereof, I have hereto set my hand, and affixed my seal, this 4th April, 1841." Signed by the the testator, but not attested by any witness.

It is insisted by the complainants, that the words of the will which I have italicised, create a trust in behalf of the brothers and sisters, and the bill is filed upon that hypothesis.

Did Mr. Ellis intend to create a trust, and make his wife a trustee for his brothers and sisters? It is certainly true, that technical language is not necessary to the creation of a trnst. It is sufficient, if it clearly appear from the language employ-

ed by the testator, that it was *his intention* to create a trust; for the intention of the testator, deducible from an examination of the whole will, must in all such cases be the pole-star to guide us to a correct conclusion.

The counsel for the plaintiffs in error has referred us to many authorities, and the books abound with cases, showing that in interpreting the language of wills, the English chancellors, from an early day, have gone great lengths in creating implied, or constructive trusts, from mere recommendatory or precatory words of the testator. These cases are collected and commented on by the able commentator on equity jurisprudence, Mr. Justice Story, (2 Com. § 1068, *et seq.*,) who insists, that the doctrine of thus construing expressions of recommendation, confidence, hope, wish, and desire, into positive and peremptory commands, is not a little difficult to be maintained upon sound principles of interpretation of the actual intention of the testator. "It can scarcely be presumed," says this learned author, "that every testator should not clearly understand the difference between such expressions, and words of positive direction and command; and that in using the one, and omitting the other, he should not have a determinate end in view. It will be admitted on all sides, that where the intention of the testator is to have the whole subject as a pure matter of discretion to the good will and pleasure of the party, enjoying his confidence and favor; and where his expressions of desire are intended as mere moral suggestions, to excite and aid that discretion, but not absolutely to control and govern it; there, the language cannot and ought not to be held to create a trust." 2 Sto. Eq. § 1069.

There can be no doubt, but that if we must follow the earlier English adjudications upon this subject, the words in this will must be construed as creating a recommendatory trust in favor of the complainants. See Massey v. Sherman, Ambler Rep. 520; Prevost v. Clarke, 2 Madd. Rep. 458; Pr. Ld. Ridesdale, Carey v. Carey, 2 Scho. & Lef. 189. According to these decisions, the words "desire," (7 Ves. 36,) "will and desire," (2 Mer. 437,) "request," (1 Bro. C. C. 489,) "recommed," (2 Ves. 333; 19 Ib. 656; 1 Sim & Stu. 387,) and the like, have been considered as raising a trust,

and changing a legatee into a trustee. But the doctrine of the English courts of chancery is to some extent departed from by the recent decisions of that country, and a strong desire is manifested to give to such words their natural and ordinary signification and effect.

In Sale v. Moore, 1 Sim. 534, the vice chancellor, (Sir A. Hart,) said, "the first case that construed words of recommendation into a command, made a will for the testator; for every one knows the distinction between them." See also, a similar opinion by Lord Ch. Baron Richards, in Meredith v. Heneage, 1 Sim. 542, and by Lord Eldon in Wright v. Atkyns, 1 Ves. & Beam, 315. In Knight v. Knight, 3 Bevan, 148, Lord Langdale said, in speaking of the creation of such trust, and the examination of the authorities to be consulted in relation to them, "it is, unfortunately necessary to make some distinction between the intention of the testator and that which the court has deemed it to be its duty to perform; for of late years, it has frequently been admitted, by judges of great eminence, that by interfering in such cases, the court has sometimes rather made a will for the testator, than executed the testator's will according to his intention," &c. See 2 Story's Eq. 4 ed., 455, note 2; Hill on Trustees, 72. In Pope v. Pope, 10 Sim. 5, it was held, that a gift by a testator of the capital of his business to his wife, "trusting that she will act justly and properly towards all our children," was the expression of a wish, and not the creation of a trust. The words construed as creating no trust in Wright v. Wright, *supra;* were, "I trust to the justice of my successors in continuing the estates in the male succession, according to the will of the founder of the family." In a recent case, (*Ex parte* Payne, 2 Young & Coll. 646,) when the devise was to the testator's daughter, "as some reward for her affection and unwearied and unexampled attention to him during his illness of many years," and adding, "I *strongly recommend* to her to execute a settlement of said estate, and thereby to vest the same in trustees, for the use and benefit of herself for life, with remainder to her husband, and his assigns for life, remainder to all and every the children she may happen to have, if more than one, share and share alike; and if but one, the whole to such one; or to such other uses as my said

daughter shall think proper; to the intent that the said estate, in the event of her marriage, may be effectually protected and secured," it was held the daughter took an absolute estate.

These anthorities, with many others which might be cited, show the tendency of modern decisions in England, not to extend this doctrine of implied trust from precatory words, but to go back as far as may be consistent with the current of their previous adjudications, to what I humbly conceive to be the true rule of interpretation—that is, to give such recommendatory expressions their natural, ordinary and familiar sense, and having arrived at the true intention of the testator, to let that intention, if lawful, be the rule of decision in the particular case. Thus the court will execute the will of the testator, and not by a forced technical construction of his words, make a will for him.

Applying this rule of interpretation to the case before us, we have no hesitation in pronouncing, that the will of Mr. Ellis does not create a trust in favor of the complainant. He *recommends* to his wife, to whom the will says he gives his entire estate, to make some small advance, *at her convenience*, to each of his brothers and sisters, say to each one thousand dollars. Now it does seem to me, that an ingenuous mind in search of truth, being required to ascertain the intention of the testator, giving to the language employed its ordinary sense, would at once conclude, that the testator never intended the thousand dollar payment to each of the complainants as an imperative command. If he intended it as a command, why did he not use appropriate language? Why not *directly bequeath* to them the money which he merely *recommends his wife* to give? If he designed to fix absolutely the amount to be paid, why use the term "a small allowance?" If such allowance was not intended to be left discretionary with the wife, why make its payment depend upon "her convenience?" Upon the whole will, it is, I think, impossible to resist the conclusion, that the testator, having as he supposed, conferred upon his wife his entire estate, both real and personal, *recommends* to her favorable regard his brothers and sisters, to incite her to the performance of a moral duty, in making to them a *small allowance*, if the con-

dition of his estate, after the payment of his debts, would render it *convenient* for her to do so. The construction of the will, as contended for by the complainants in their bill, would most manifestly defeat the intention of the testator. It must be conceded, that his leading object was to make a provision for his wife; that for his brothers and sisters, at most, formed but a subordinate consideration. Now for want of being witnessed, the will is ineffectual to pass the real estate, and consequently it descends to the complainants, who are his heirs at law. If then, it should so turn out, that after the payment of the debts, the personal property should only be sufficient, upon a forced sale, to raise the funds required to pay off these pecuniary legacies, the wife, who as we have said, was doubtless the main object of the testator's bounty, is stripped of all the property. We thus allude to the consequences of such construction, not that the hardness of the case should in any degree tolerate a departure from principle, but to show that such interpretation results in absurdity, and does palpable violence to the clearly expressed intention of the donor.

We have thought it due to the importance of the principle involved, to say this much, as it is for the first time presented before this court. In departing from the earlier English authorities, we are not wanting in respect for the transcendant learning and abilities of the chancellors who delivered the opinions. We only refuse to follow a rule of construction, which many of them acknowledge to have been founded in error, and from which they would gladly have receded if they could. That they, upon this point, have erred, but confirms the declaration in The Book, that "great men are not *always* wise."

The view we have taken of the will renders it unnecessary to investigate the other questions presented by the record. It follows from what we have said, that the chancellor correctly dismissed the bill, and his decree must be affirmed.

GERON v. FELDER, USE, &c.

1. Where the judicial certificate, to an exemplification of a judgment, rendered in the circuit court of Noxubee county, in the State of Mississippi, recites, "I, A B D, presiding judge of the fourth judicial district of the State of Mississippi, which said district, includes the county of Noxubee," do certify, &c: it is a sufficient compliance with the act of Congress to admit the transcript in evidence.
2. A digest of the laws of a State, which does not appear to have been published by authority of law, is inadmissible as evidence to establish the rate of interest of such State.

Error to the Circuit Court of Madison. Before the Hon. Geo. D. Shortridge.

THE defendant in error brought debt on a judgment rendered in his favor, against the plaintiff in Mississippi. The plaintiff in error objected to the certificate of the judge, as insufficient to authenticate the record, under the act of Congress, but his objection was overruled.

The certificate is in this form: "I, Armistead B. Dawson, presiding judge of the fourth judicial district of the State of Mississippi, (which said district includes the county of Noxubee,) do hereby certify," &c.

The defendant in error, to prove the law of Mississippi regulating interest, offered as evidence a printed volume, purporting on its title page to be a digest of the laws of Mississippi; but there was no evidence that the book was published by any legislative authority. It contained an address to the people of Mississippi by the author, and was printed in 1839.

The plaintiff in error objected to the introduction of this volume, as evidence of the rate of interest in Mississippi, but the objection was overruled.

To the above rulings of the court, the plaintiff in error excepted, and now assigns them as error.

ROBINSON, for plaintiff in error.

J. J. Ormond, for defendant in error.

The printed volume of the laws of Mississippi, on its face purported to be a digest of the laws of that State, and was properly admitted in evidence. To require the proof contended for—that it was published by legislative authority—would destroy the rule, as it would be quite as easy to prove the existence of the law in controversy, as the act authorizing the publication of the digest. The adjudged cases show fully that there has been a relaxation of this rule of evidence, and fully sustain the decision of the court. 1 Greenleaf Ev. 529, § 480; Young v. Bank of Alexandria, 4 Cranch, 388; Biddis v. James, 6 Binney, 321; Kean v. Rice, 12 S. & R. 203.

DARGAN, J.—It is not necessary, that the certificate should use the precise language of the act of Congress, but when different language is adopted, it must not be equivocal, or capable of bearing a different meaning, or of conveying a different *idea*, than the language used in the act. 13 Ala. 722. The certificate in this case shows, that the judge who made it was the *presiding judge* of the circuit court of the fourth judicial district, and also that Noxubee county, in the circuit court of which the judgment was rendered, composed a part of this district. The certificate therefore excludes any other idea, *than that he was the presiding judge of the court*, the record of which was certified. The transcript was properly admitted as evidence. But we think the court erred in permitting the printed volume, purporting to be a digest of the laws of Mississippi, to go to the jury as evidence to prove the statute law of that State, fixing the rate of interest. It did not appear, either from the book itself, or otherwise, that the author published it, by any authority of the laws of that State, or that he was required by law to publish, *or digest* the statute laws of Mississippi. If the author had merely made a transcript of the statute, it would be clear to all, that this transcript or copy could not be received as evidence, without proof that it was a correct copy, and I cannot perceive how this transcript can become legal evidence, by being printed in a book merely.

In the case of Hanrick v. Andrews, 9 Porter, 1, the interest law of New York was read from a book published by the authority of that State, this court held, that it was properly admitted as evidence. The authorities on which the court relied in coming to that conclusion, fully sustain the opinion of the court. But I have found no case that holds, that a book purporting to be a digest of the statute laws of a State, can be received as evidence, unless it was published by authority of law. It is the fact, that the author was authorized, or required by law, to publish a digest, that makes his book evidence of the laws it contains, and not the mere fact that he has published a book, purporting to be a digest of those laws.

How it shall be made to appear, that the author was authorized to publish his digest, we will not inquire. But in the absence of all proof on this subject, and the book containing no evidence within itself, that it was published under the authority of law, it cannot be received as evidence of the laws it purports to contain.

Let the judgment be reversed, and the cause remanded.

JONES AND ABERNATHY v. WELCH.

1. A writ of *supersedeas*, which embraces two separate executions, and commands the officer to suspend proceedings on each, is not a nullity.
2. Where, in an action of trespass *vi et armis* against J and A, there are any circumstances detailed in evidence, from which the jury might reasonably infer the participation of J in the trespass, it is not error to refuse to charge the jury, that they ought to find the defendant J not guilty.
3. In an action of trespass against an officer, and the plaintiff in an execution, for illegally selling property under it, it is not error to instruct the jury, that they may look to the facts, that the latter was the plaintiff in the execution, and that he had just before the sale, delivered to the officer a blank paper, with his signature thereon, as circumstances, in connection with the other proof, tending to show, that the sale was made under his directions.

Error to the Circuit Court of Tuscaloosa. Before the Hon. Thomas A. Walker.

THIS was an action of trespass *vi et armis*, instituted by the defendant against the plaintiffs in error. By the bill of exceptions, it appears that two executions in favor of David G. Jones, one of the plaintiffs, against Welch, the defendant in error, issued from a justice's court of Tuscaloosa county, and were levied on the 16th May, 1844, by James Abernathy, the other plaintiff, on certain chattels, as the property of said Welch: that on the 27th May thereafter, said Welch petitioned the judge of the county court of said county for *supersedeas* of said executions, both executions being included in the same petition: that a *supersedeas* was awarded and issued, embracing both executions, and was served on said Abernathy: that Abernathy went to Sullivan, the magistrate that issued the execution, for advice, who instructed him not to sell the property, unless he obtained a bond of indemnity from Jones: that after this, Abernathy informed the magistrate that he had sold the property, and that Jones had given him a bond of indemnity, at the same time producing a sheet of paper, on which was written the names of Jones and another person; and that the magistrate wrote above the signatures a bond of indemnity. The signatures to the paper were proved also.

The counsel for the plaintiffs in error asked the court to charge the jury:

1. That if they believed the writ of *supersedeas* was a writ superseding two several executions at the same time, it was void, and no trespass was committed in disregarding it.

2. That the defendant Jones, could not be affected by the acts and declarations of his co-defendant, Abernathy, made and done in his absence, without proof that Abernathy was acting under the directions of Jones.

3. That under the evidence in the case, the jury ought to find the defendant Jones not guilty.

The court refused to give the first and third charges asked, but gave the second, with the qualification, that the jury might take the facts, that Jones was the plaintiff in the executions, and that his signature was on the paper presented

by Abernathy, to Sullivan, the magistrate, as circumstances, connected with the other circumstances in the case, tending to show that Abernathy sold the property under Jones's directions. To the qualification of the charge as given, and to the refusal to charge as asked, the plaintiffs in error excepted, and now assign them as error.

P. & J. L. Martin, for plaintiffs in error.

Peck, for defendant.

1. There is no error in the refusal of the court to give the two charges asked. As to the first, there is no force in the objection that both the executions were superseded by one writ.

2. And as little in the charge, that the jury should find for the plaintiffs in error. The evidence certainly conduced to prove that the trespass was committed by the authority, or by the advice of Jones, and therefore, the court properly left it to the jury to decide that question.

3. The jury had a perfect right to find a general verdict against both the plaintiffs in error; they were not bound to find especially against each, because they had plead severally.

COLLIER, C. J.—1. The writ of *supersedeas* was not a nullity, because it commanded the constable to suspend proceedings on two executions. The petition prayed the proceedings and judgments upon which each of them were founded, to be certified to the county court, that the causes might be there retried. Including both cases in the petition, and applying the *supersedeas* to both of them, was a matter of convenience, which could prejudice no one; for when the proceedings of the justice were returned to the justice, they would be tried as distinct causes, unless they were consolidated by the court. Murray v. Ezzell, 3 Ala. Rep. 148; Powell v. Gray, 2 Ala. Rep. 77; W. & C. Rail Road Co. v. Bingham, 5 Ala. 657; Cooper v. Maddan, 6 Ala. 431.

2. The court very properly refused to charge the jury, that upon the evidence, they should find the defendant, Jones, *not guilty*, and there is no valid objeetion to the charge, that the jury might consider of the facts, that Jones was the plain-

tiff in the executions, and that one of the signatures to the papers presented by the defendant, Abernathy, to Sullivan, was a circumstance, with the other proof in the cause, tending to show that Abernathy sold the property under Jones's directions. The justice had advised the constable to demand a bond of indemnity from Jones, and it is but a reasonable presumption, that the blank paper subscribed with the name, and in the hand-writing of Jones, with the signature also of another person, was delivered to the constable by the persons whose names were written on it, for some purpose. Whether to be filled up as such a bond, was a question for the consideration of the jury. It does not appear in so many words, that this paper was also sealed, but this may be presumed from the testimony of the justice, that he filled it up as an indemnifying bond; and from the too common practice of thus delivering sealed blanks, over which words are intended to be written.

There is then no error in the ruling of the circuit court, as the jury might from the facts have inferred a notice and positive approval of the sale. The judgment is consequently affirmed.

ROYSTON, Adm'r, v. HOWIE, use, &c.

1. A direction by the plaintiff to the sheriff, without consideration, to stay proceedings on an execution against the principal debtor, does not discharge the surety from the payment of the debt.
2. The creditor is not estopped from showing the truth of the matter, because he may, under a mistaken view of his legal rights, have said that the arrangement made with the principal had discharged the surety.

Error to the Circuit Court of Perry. Before the Hon. John D. Phelan.

This was an action brought by the defendant against the plaintiff in error, as administrator of Charles Sibley, deceased, on a note made by said Sibley, in his lifetime. The said administrator plead as a set off, a judgment of the circuit court of Dallas, in favor of his intestate, against one Brooks, and the said Howie. From a bill of exceptions found in the record, it appears that the plaintiff in error, to sustain his said plea, introduced in evidence on the trial, a record of the said judgment, rendered on the 26th October, 1845. The defendant in error, who was the plaintiff below, then offered a witness, who testified that said Sibley, in his life time, had informed him, that said Howie was but the surety of said Brooks on the cause of action on which said judgment was founded; that, after execution had issued on said judgment said Brooks paid to him $200 on it, and that he had thereupon instructed the sheriff to return said execution to the court whence it issued. The same witness further testified, that said Sibley informed him, that he should lose the balance of his money, that said Brooks had left the county, and that he had lost his right to recover it from Howie, the surety, in consequence of his having granted indulgence to said Brooks, the principal debtor. It was further proved, that said Brooks, before he left the country, had property, out of which the sheriff could have made the money, if the execution had not been staid by said Sibley.

There was no proof of fraud or collusion between Brooks and Sibley. The court charged the jury, that if they should find the facts above stated to be true, the said Howie, the surety, was discharged from all liability on said judgment, and the set off of defendant should not be allowed. To this charge, the defendant, Royston, excepted, and it is now assigned as error.

I. W. Garrott, for plaintiff in error.

The following authorities establish the position, that on the facts shown the surety was not discharged. Sawyer v. Bradford, 6 Ala. 572; Agee v. Steele, 8 Ala. 948; Armistead v. Thomas, 9 Ib. 586, 589; Gilder v. Jeter, 11 Ib. 256; Sawyer's adm'r v. Patterson, Ib. 523.

As to payment of part of the debt being no consideration

which would bind the creditor, see Reynolds v. Ward, 5 Wend. 501, 505; 4 U. S. Dig. 500, 228, 236.

JOHN, contra.

Any neglect of the creditor, occasioning the loss of securities, to the benefit of which the security was entitled, will *pro tanto*, discharge the security. Chichester v. Mason, 7 Leigh, 259; Theobold on Prin. & Sur. 1 Law. Lib. 87; McCollum v. Kinkley, 9 Vt. 143; Bank Man. v. Boollett et al. 13 Ib. 315.

CHILTON, J.—The precise point involved in this case was decided by this court, in Bradford and Sawyer, 6 Ala. Rep. 572, where the court held the security was not discharged by an arrangement between the execution creditor and principal debtor, similar to the one here complained of. See also, Agee v. Steele, 8 Ala. Rep. 948; Armistead v. Thomas, 9 Ib. 586; Gilder v. Jeter, 11 Ib. 256, and The Bank v. Godden et al. at this term. That the creditor, under a mistaken view of his legal rights said he had discharged the sureties by the arrangement, cannot estop him from showing the truth of the matter, and from availing himself of their liability to satisfy his demand.

Let the judgment be reversed, and the cause remanded.

BRADFORD v. GOLDSBOROUGH, BY NEXT FRIEND, &c.

1. The equitable right of the wife to a settlement of her undivided distributive share of the estate of her deceased father, in the hands of his executrix, is a consideration sufficiently valuable, to support a deed to her from her husband, relinquishing such distributive share for her sole and separate use.
2. Such a deed, although inoperative at law, will be enforced, in equity, against an execution creditor of the husband, who is seeking to condemn

the property, for the satisfaction of his debt, after it has come to the possession of the wife.

Error to the Chancery Court of Macon. Before the Hon. W. W. Mason.

THE defendant in error filed her bill in equity, by her next friend, alledging, that in 1844, she was married to Charles H. Goldsborough, her present husband. That at the time of the marriage, the complainant, as legatee under her father's will, and distributee of his estate, was entitled to a small amount of property, which had not come to her possession, but was in possession of her mother, the executrix of the will of her father; and it being in her possession, and a distribution being desired, her husband, at the request of her friends, on the first of January, 1845, before the estate was divided, and before her interest was ascertained, executed his certain instrument in writing, whereby he relinquished, and quit claimed all right, title, and interest, to all the property to which oratrix might be entitled from her father's estate, and by said instrument her portion was set apart, for the separate use of complainant, free from the debts, contracts, and control of her husband—the instrument being as follows:

"This indenture, made this the first of January, 1845, witnesseth: That whereas a marriage was heretofore had, and solemnized, between Charles H. Goldsborough, and Emily H. Cater; and whereas, it is desired by the parties, that the portion of property to which she may be entitled, and brought into the marriage, may be secured to her, and said property being this day about to be ascertained, and set apart to the said Emily out of her father's estate: Now, this indenture witnesseth, that to effectuate the objects aforesaid, I, the said Charles H. Goldsborough, have relinquished, and quit claim, and do by these presents, forever release, relinquish, and quit claim, all right, title, claim, and interest whatsoever, to all such property, of every sort, and species, as may fall to the lot of my said wife Emily, upon the division of her father's estate, now about to take place, and as shall constitute her portion, and to which she may be entitled: and I hereby declare, the true intent, and meaning of this indenture to be,

that all marital rights to which I should be entitled, by virtue of said marriage, to the said Emily's portion of said estate, shall be forever extinguished, and that her portion of said estate, when ascertained, and allotted, and set apart for my said wife, shall be, and remain, for her sole, and separate use, free from my debts, liabilities, and contracts."

The bill alledges, that after the execution of this agreement, the division was had, and the small interest of complainant set apart for her; a portion of which, was a slave by the name of Dick. That she received possession of said slave, and held it until he was seized by attachment, and execution, at the suit of Joseph H. Bradford and others, against Charles H. Goldsborough, and that the sheriff had divested her possession, and had the possession of said slave under such process.

The bill prays an injunction, restraining all parties from selling said slave in satisfaction of said demands, and also any other portion of her property, received from her father's estate, and for general relief.

The answer of Bradford admits the levy of the process on the slave as the property of Charles H. Goldsborough, and insists it was correctly done, for that he was in possession of said slave, and credit was given him on the faith thereof, and that neither he, nor those who gave the credit, had any notice of the separate estate the complainant had in the property.

The answer also insists, that many of the items of which the debt is composed, consisted of necessaries furnished the family, and concludes with a demurrer.

The testimony shows, that the instrument was executed, and delivered, before the division of the estate of complainant's father was had, and before her part was allotted to her. That Dick was allotted to her as a part of her share, or portion, which consisted of four slaves, and about $2,000.

The chancellor rendered a final decree in favor of complainant.

Cocke, for plaintiff in error.

1. The bill contains no equity.

2. The instrument attempted to be set up is void at law; because—1. It is made by the husband during coverture, without the intervention of a trustee. Butler and wife v. The Mer. Ins. Co. Mobile, 8 Ala. 146. 2. There is no sufficient proof of its delivery. Elliott v. Elliott, 1 Dev. & Bat. Eq. 57; Gamble v. Gamble, adm'r, 11 Ala. 966. 3. There is no release named in it.

3. Being void at law, it cannot be set up against the creditors of the husband; because—1. It was not founded on valuable consideration. 4 Paige, 64. 2. The moment the slaves came into the husband's possession, the deed or release being void, his marital rights attached. 1 Bailey's Eq. 244. 3. If it be of any validity, it can be entitled to no higher consideration than if it were (and it must in fact be so considered) a deed of gift from husband to wife, without a change of the possession; and as such it should have been recorded. Cook v. Kennerly and Smith, 12 Ala. 42. 4. It was a latent equity, which a court of equity could not enforce in opposition to the fixed lien of a creditor. The creditor's is at least the better equity.

J. E. Belser and G. W. Gunn, contra.

1. To entitle the husband to the personal property of the wife, he must have reduced the same to possession during coverture in his own right, and not as trustee. Mayfield v. Clifton, 2 Stewart, 375; Hogan v. Bell, 4 Stew. & Por. 286; Dunn and wife v. Bank, 2 Ala. 152; Andrews et al. v. Jones, 10 Ala. 400; Terrell et al. v. Green, 11 Ala. 207.

2. Anterior to this, there is in the husband only an equity or right of action, which he may or may not assert, and which none but the husband can assert, and in opposition to which the wife has an unquestionable right to a settlement, to her sole and separate use. Like v. Beresford, 3 Vesey, jr. 512; Ellebank v. Marston, 5 Ib. 737; Butler et al. v. Bank, &c. 8 Ala. 153; Hoot et al. v. Sorrell et al. 11 Ib. 386; Beresford, *ex parte*, 1 Dess. 263; 2 Story's Eq. Jur. 630.

3. Upon the attempt of the husband thus to reduce the personalty of the wife into his possession, a court of equity will compel him to make a suitable settlement upon her.

Dunn nnd wife v. Bank, 2 Ala. 152; Bennett v. Dillingham, 2 Dana, 437.

4. If the foregoing propositions be true, it is clear that the husband might do, without the order of a court of equity, what that court would order to be done. As such, the conveyance or release of the husband is precisely what he would have been required to do, and is therefore not voluntary: especially is this true as to subsequent liabilities of the husband. Conn v. Kavanaugh, 11 Ala. 169; Dunn, &c. v. Bank, 2 Ib. 152; Jones v. Usmer, 1 Sim. & Stu. 315; 1 Story's Eq. Jur. 365.

5. Nor is the conveyance void because made directly to the wife, without the intervention of a trustee. It is the peculiar province of equity, to give effect to such instruments. Gamble v. Gamble, adm'r, 11 Ala. 972; Hoot v. Sorrell, Ib. 386; Trusly v. McCarty, 1 Stew. & Por. 56; Harkins v. Coulter et al. 2 Porter, 463; Sevier v. Stone, 3 Ala. 485.

6. Such conveyances are not within the letter or spirit of the terms of the registration act. It is neither a deed of trust, mortgage, or other legal incumbrance, and is not required to be recorded. Swift v. Fitzhugh, 9 Porter, 40; Smoot v. Fitzhugh, Ib. 72; Laz. v. Lewis, 5 Ala. 459; Thomas et al. v. Davis, 6 Ib. 113; Cutt v. Hardy, 10 Ib. 514; Lee v. Mathews, Ib. 681.

DARGAN, J.—The property upon which the deed was intended by the parties to operate, was the undivided interest of the wife, in the estate of her father, the legal title to which was vested in the mother, as executrix. That the wife was in equity, before her interest was reduced to possession, entitled to a settlement out of this property, as against the claims of her husband, his creditors or assignees, is too clear to require argument or authority. This right then of the wife, to have a settlement decreed her in opposition to the right of the husband, and to all who may claim through him, is the consideration upon which the deed of the first of January, 1845, executed by the husband in favor of the wife, is founded; and that such a consideration is sufficient to support the deed in equity, must be manifest from the reflection, that had the wife filed the bill against the husband,

previous to the division of her father's estate, equity would have decreed the husband to make a suitable settlement upon her. If, at the time the deed was executed, the wife could have filed her bill against her husband to have a suitable provision settled upon her, and the husband did by deed, what equity would have decreed him to do, of course the court must uphold the deed. But it is contended that the deed is void at law, and being void at law, as soon as the division of the property was made, the marital rights of the husband attached, and the claim of his creditors must therefore prevail.

It is certainly true, that the deed must be considered as a nullity in a court of law, for at law, the individual existence of the wife is merged in that of her husband. They are considered as one, and cannot contract with each other. But the rule is widely different in a court of equity, and husband and wife may for good reason, and on valuable consideration, contract with each other, and equity will uphold and sustain the contract. 2 Sto. Eq. 601, § 1372. In the case of Gallego v. Gallego's ex'r, 2 Brock. 285, the plaintiff was entitled to a legacy under the will of her father, and her husband executed an instrument under seal, relinquishing his right to the legacy to the wife. The wife sued the executor of the will, by her next friend, and the executor insisted, that she being a *feme covert*, could not demand the legacy; and further, that her husband was indebted to the testator, and insisted on the right to retain the amount of this debt; also, that another creditor of the husband had attached the legacy in his hands.

Ch. J. Marshall held the relinquishment made of the legacy by the husband, in favor of the wife, to be valid against his creditors; and decreed the payment of the legacy to her, in accordance with the terms of the instrument. Indeed, it must necessarily result from the fact, that a married woman can hold, and enjoy separate property, and that she is entitled against her husband to have a settlement made upon her out of her *choses in action* not reduced to possession, that the husband and wife may contract in reference to those subjects; and if their contracts are reasonable, a court of eqnity must sustain them. It is not contended, that there is any circum-

stance connected with this contract, within itself, that would induce a court of equity to condemn it, or to refuse to sustain it; except that it is void at law, and being void at law, the possession of the slave by the wife, was the possession of the husband, and thus the marital right was perfected, and his title at law absolute. In a court of law, this would certainly be the condition of the property; but in equity, we see, that the slave did not come to the possession of the husband before he entered into the contract, which the complainant seeks to enforce; and that by the terms of this contract, the husband agreed with the wife, on a valuable consideration, to wit, her equitable right to a settlement, that she should hold this slave for her own separate use. This contract equity will enforce, hence the possession of the husband, even if it can be considered as his possession, would be that of a trustee for his wife; and if the legal title vested at law in him, in equity he must be considered a trustee, and the equitable title of the wife must prevail over the husband and his creditors.

The decree of the chancellor must be affirmed.

Chilton, J., not sitting.

BUSH v. BRADFORD, use, &c.

1. An instrument which acknowledges the payment of the consideration for certain personal property therein described, though in form a receipt, is in effect a bill of sale.
2. If a bill of sale of blooded stock contains no warranty, express or implied, beyond that of title, parol evidence is inadmissible to add to it a simultaneous verbal warranty as to age and soundness.
3. An error that works no injury to the party complaining of it, is not a ground of reversal in an appellate court.
4. Where testimony is introduced by a defendant, tending to prove false representations by the plaintiff, in a sale of blooded stock, as to age and soundness, it is competent for the plaintiff to repel the presumption of

fraud, to show that he informed the defendant, after the sale, of an error in his representations, and offered to take back the property, which offer the defendant rejected.

Error to the Circuit Court of Benton. Before the Hon. S. C. Posey.

This was an action of assumpsit on a promissory note instituted by defendant against the plaintiff. Issues were formed on the pleas of non-assumpsit, want of consideration, failure of consideration, fraud, and set off. The defendant introduced the following instrument in evidence:

"The State of Alabama, Benton county—Received of Daniel Bush, twenty-two hundred dollars, for the following described blooded stock, viz: No. 1. Miss Lumpkin, bay mare, sired by old Bertrand, her dam by Koskiusko, with suckling by her side, mare colt, Mary Cochran, foaled last spring, sired by Gray Gander. No. 2. Eliza Gray, (gray filly,) by Editor, and he by old Timoleon, Eliza's dam by Napoleon 2d, &c. No. 3. Gray mare, Express, by old Sir Richard, now in foal by Gray Gander; above named mare Miss Lumpkin also in foal by Gray Gander. Given under my hand, &c., Nov. 3d. 1841. Jacob T. Bradford,

Witness, John Spencer. by his agent Thos. M. Likens."

Proved that the above mentioned blooded stock was the consideration of the note sued on, and that a parol warranty of the ages of soundness of the animals, was made at the time of its execution, which had in some particular been broken. To rebut the evidence of a simultaneous parol warranty, the plaintiff offered evidence which was objected to, and the court overruled the objection.

Several other questions arose as to the admissibility of testimony, all of which, with the facts upon which they were fuonded, are sufficiently noticed in the opinion of the court for a full understanding of them.

The several rulings of the court adverse to the plaintiff in error, were excepted to by him, and are now assigned as error.

J. B. Martin, for plaintiff in error.

1. The offer of Likens to the plaintiff in error, after the completion of the trade, to take back the mare, Eliza Gray, at the price paid for her by the plaintiff in error, and pay him in the property received from him, should, in the absence of proof that he was authorized by Bradford to make such rescission, have been rejected as illegal, and calculated to mislead the jury. 1 Phil. Ev. 99, 100; Ib. & Cowan's notes, 180, note 182; Greenl. Ev. 125, 134; Strawbridge v. Spann, 8 Ala. 824; 1 Story's Ag. 124, 129; Scarborough v. Reynolds, 12 Ala. 252; Bradford, use, &c. v. Bush, 10 Ib. 386.

2. When the representations of a vendor amount to a warranty, it is immaterial whether he believes them to be true, at the time he makes them, and hence the testimony of the agent, Likens, on this subject, was irrelevant and well calculated to mislead the jury.

3. Whether the representations of a vendor were intended by him, and received by the pnrchaser as a warranty, are to be determined by the jury, from the facts and circumstances. The vendor, nor his agent, are allowed to say what the intention was, or in what sense they are received. Ricks v. Dillahunty, 8 Por. 138-9; Duffee v. Mason, 8 Cow. 26; 19 Johns. Rep. 290; 20 Cow. 438; 2 Johns. 203; Cook v. Mosely, 13 Wend. 278; Whitney v. Sutton, 10 Ib. 412; Sto. on Sales, § 354; 4 How. Miss. 59.

The instrument executed by Likens, as the agent of Bradford, to Bush, is a mere receipt, which is neither varied, explained, or changed, by proving representations made by Likens, which amounted to a warranty, and especially where the defence is for fraud or deceit. Cozens v. Whitaker, 3 S. & P. 322; Garrow v. Carpenter & Hanrick, 1 Por. 358.

Though a vendor may refuse to give a warranty in terms, he is still liable for fraud and deceit. Burnet v. Stanton & Pollard, 2 Ala. R. 181; Houston v. Burney, 2 Smede & Mar. 583.

Rice and Morgan, for defendant in error.

1. There is no rule of evidence to be laid down in this court, but a reasonable one, such as the nature of the thing that is to be proved, will admit of. Tamlyn's L. of Ev. 97-8; 51 Law Lib. 76-7.

2. Where words are used, the meaning of which is not fixed by law or otherwise, and it becomes materialto show the intention with which they were used, (whether as a warranty or mere matter of opinion,) it is competent for the agent who used the words, to state his intention in the use of such words, especially on a cross-examination by the seller, where the agent is offered by the buyer, to prove that there was a warranty, or fraud, in the sale. Whether the words used by the agent depended on the intention with which they were used and received. Barnett v. Stanton et al. 2 Ala. 181; Bradford v. Bush, 10 Ib. 386; 3 Stark. Ev. 1660-1, and note 1, quoting the decision from 7 Serg. & R. 482; Head v. Shaver, 9 Ala. 791.

3. Where objection is made to certain testimony, if a portion is admissible, the court may rightfully overrule the objection in toto, as the court is not bound to distinguish between the legal and illegal evidence.

4. The conversation between the plaintiff in error and Likens, some days after the sale, was clearly admissible. It was the admissions or declarations of the plaintiff in error, about the property in dispute, and it tended directly to destroy the force of the evidence of Yoe, a witness of plaintiff in error.

5. General objections to testimony, without stating any ground of objection, may be disregarded and overruled by the primary court, and this court will not revise such decisions. Donnell v. Jones, 13 Ala. Rep. 490; Milton v. Roland, 11 Ib. 732.

COLLIER, C. J.—The contract between the plaintiff, by his agent, and the defendant, is evidenced by a writing. It merely acknowledges the receipt of a definite sum for blood stock, describing them by their names and pedigrees; and according to its legal effect, is a transfer of the stock by the plaintiff to the defendant, for the consideration expressed. There can be no doubt that the writing does not contain a warranty, either express or otherwise, of the ages or soundness of the stock, and it is therefore material to consider, whether it is allowable to show by extrinsic proof, that there was such a warranty.

It has been repeatedly held, that where a bill of sale of a slave contained a warranty of title, that the vendee could not alledge and prove a verbal warranty of soundness, made at the same time. Wren v. Wardlaw, Minor's Rep. 363; Duff v. Ivey, 3 Stew. Rep. 140; Pender v. Fobes, 1 Dev. & Bat. 250; Read v. Duncan, 2 McC. Rep. 167; Hitchcock v. Harris, 1 Mill. Rep. (Lou.) 311. So where a bill of sale of a ship covenanted to defend the title, it was decided, that the vendee could not set up a parol warranty, simultaneously made, that the ship was copper fastened. Mumford v. McPherson, 1 Johns. R. 414. If the bill of sale imports no warranty, or any other contract beyond the mere conveyance of title, it is not permissible to add to it an additional stipulation by parol; for it must be presumed that the writing is complete, and fully discloses the contract of the parties. Van Ostrand v. Reed, 1 Wend. Rep. 424; Dean v. Mason, 4 Conn. R. 428; Reed v. Wood, 9 Verm. Rep. 285; Bayard v. Malcolm, 1 Johns. Rep. 467, by Kent, C. J.; O'Hara v. Hall, 4 Dall. Rep. 340. See further, Sommerville v. Stephenson, 3 Stew. Rep. 271; Paysant & Ware v. Barringer, et al. 1 Ala. Rep. 160; The Montgomery R. R. Co. v. Hurst, 9 Ala. Rep. 513; Hair v. La Brouse, 10 Ala. Rep. 548; Brown v. Isbell, 11 Ala. Rep. 1009; Adams v. Garrett et al. 12 Ala. Rep. 229; Gordon v. Phillips, 13 Ala. Rep. 565; Austin v. Sawyer, 9 Cow. Rep. 39; Brigham v. Rogers, 17 Mass. Rep. 371; Hamilton v. Wagner, 2 Marsh. Rep. (Ky.) 331; Atherton v. Brown, 14 Mass. Rep. 152; Creery v. Holly, 14 Wend. Rep. 30; Thompson v. Ketcham, 8 Johns. R. 189; La Farge v. Richert, 5 Wend. Rep. 187; Simpson v. Henderson, 1 Mood. & Malk. Rep. 300; Ely v. Adams, 19 Johns. Rep. 313; Wright v. Weakly, 2 Watts' Rep. 89; Hunt v. Adams, 6 Mass. Rep. 519; McCulloch v. Girard, 4 Wash. C. C. Rep. 292; Commissioners v. McCalmont, 3 Penna. Rep. 122; Sharp v. Sipsey, 2 Bail. Rep. 113; Shepherd v. Temple, 3 N. Hamp. Rep. 455; Reab v. McAllister, 8 Wend. Rep. 116; Gerrish v. Washburn, 9 Pick. R. 338; Hall v. Maccubin, 6 Gill and Johns. Rep. 107; McCreary v. McCreary, 5 G. & Johns. Rep. 147.

The writing in the present case is not a mere receipt for

the price of the stock. True it acknowledges that the vendor has received the price, but it also purports to pass to the vendee the title, in consideration of the sum paid. In point of law, it is a bill of sale, and must so operate. There is nothing to indicate that it does not fully express the contract of the parties. We have seen that it does not contain a warranty in terms, and if any can be implied from it, it is that the stock are of the pedigree described; and in this particular it is not insisted that there has been a breach. As it respects their soundness and ages, there is no affirmation upon the face of the writing, and several of the citations we have made explicitly determine, that it cannot be interpolated by proof of such a simultaneous verbal stipulation.

The warranty then being placed out of view, or rather its existence excluded by the form of the bill of sale, the evidence tending to disprove it, could not prejudice the defence; for whether the extrinsic proof showed facts which in the absence of a written bill of sale, would establish a warranty, was wholly immaterial—the silence of the bill of sale in this particular, would prevent the defendant from insisting upon it. This being the case, it is clear that the countervailing evidence being addressed to a defence which the defendant could not successfully assert, he has sustained no injury by its admission, and cannot avail himself of a mere abstract error, if indeed it be one. Strawbridge v. Spann, 8 Ala. R. 820.

The answer to the first interrogatory in the deposition of Likens, was admissible for the plaintiff, if for no other reason, because it tended to impair the weight of Yoe's testimony, and perhaps in the opinion of the jury would have entirely destroyed its effect. Yoe, it is affirmed, saw the stock two or three days after the defendant's purchase, and proves, that from their appearance at that time, they were incurably unsound when he bought them; he also speaks of the age of one of them, and states the difference in value which would be made by a difference in age. Now Likens states, that a few days after the sale, he informed the defendant that he had understood, the mare, "Eliza Gray," was older than she was represented, and if he (defendant) was dissatisfied, witness would take her back, and allow him the price at which

she was estimated in the contract; witness also offered to take back the colt, "Mary Cochran," on the same terms, but defendant refused both these propositions, remarking that he would not take for Eliza Gray one thousand dollars. This testimony tended to show the absence of fraud in misrepresenting the age of Eliza Gray, and that for the error of judgment, the defendant waived all claim to compensation; and for these reasons, if no other, it was properly received. It was for the jury, if material, to inquire whether the conversation between Likens and defendant occurred previous to the discovery by the latter, that some of the stock were diseased, or Yoe was called on to administer medicine to them.

It was relied on as a defence to the payment of the note, that the vendor, or his agent, had practised a fraud upon the defendant. To repel this defence, the *quo animo*, the agent made representations in respect to the ages, &c. of the stock, was a material inquiry. It was therefore clearly competent for him to show that he acted in good faith, and the statements he made at the time of the sale were opinions honestly entertained by him.

Having determined that the bill of sale does not contain a warranty, and that it is not allowable to superadd such a term by extrinsic proof, we need not inquire whether a party who makes a sale of personal property, can be permitted to show, that the representations of his agent were not intended as a warranty, but as matter of belief or opinion. However this may be, we have seen that defendant could not have been prejudiced.

If there was neither a warranty or fraud, the pleas of a want and failure of consideration, could not be supported. Ricks, adm'r, v. Dillahunty, 8 Port. Rep. 134. It follows from what has been said, that there is no error in the ruling of the circuit court; and the judgment is therefore affirmed.

HUGHES v. STRINGFELLOW.

1. D, in 1841, with the assent of his creditors, executed to H a deed of trust for their benefit, by the terms of which H is required to sell the property, for one third cash, and on a credit of one and two years, for the balance. H sells it on a credit to the first of January, 1843, for an amount more than sufficient to pay all the debts, and on the expiration of the credit, without the consent of the creditors, extends the time of payment from five to seven years. H then made a settlement with all the creditors, except S, and on the 1st July, 1846, upon an accounting with S, executed to him an instrument specifying the amount due him from the trust fund up to that date. Held—1. That S can maintain an action of assumpsit against H, for money had and received to his use. 2. That proof of payment made by H to S, prior to the 1st July, 1846, on his debt, unaccompanied with any evidence tending to show a mistake in the settlement made on that day between H and S, was properly rejected. 3. That the undertaking of H, is not to answer for the debt or default of another, but to discharge a debt out of funds placed in his hands for that purpose, by the debtor.

Error to the Circuit Court of Pickens. Before the Hon. S. Chapman.

This was an action of assumpsit brought by defendant against plaintiff in error. By the bill of exceptions it appears, that the plaintiff in error was the trustee under a deed of trust, executed in 1841, by one Benjamin Dawson, for the benefit of some nineteen creditors, by which it was provided, that the property was to be sold by the trustee for one third cash, and the balance on a credit of one and two years; that the creditors assented to the deed; that the property was sold on the 10th September, 1842, and notes taken from the purchaser, payable the 1st January, 1843; that said notes were afterwards exchanged for others, payable on the 1st January, 1848, '49, '50; that plaintiff in error had settled with all the creditors provided for in said deed, except defendant in error, and that on the first July, 1846, he executed and delivered to plaintiff the following instrument: "Due Robert Stringfellow, nine hundred and three dollars and

twenty-seven cents, from the Dawson fund, this 1st July, 1846. This calculation made by Dr. William Hughes." That said instrument was given for the debt due by Benjamin Dawson to defendant in error, and that plaintiff in error had received no consideration for it except the property conveyed in the trust deed, from Dawson to him, and the notes received on the sale of it, which amounted to $8,000 ; more than sufficient to pay all the debts, The plaintiff in error offered to produce in evidence, receipts of the defendant in error, of dates *prior* to the execution of the above instrument. The court refused to permit the receipts to go to the jury, unless it was first shown that a mistake had been made in ascertaining the amount which defendant in error was entitled to receive at the time of the ex cution of said instrument.

The plaintiff in error asked the court to charge—1. That defendant in error could not recover on the writing, if plaintiff in error received no consideration, and it was for the debt of Dawson.

2. That he could not recover on the money counts, irrespective of the writing, unless plaintiff in error had received money which was subject to defendant in error's debt.

3. That even if plaintiff in error intended the writing as a due bill from himself, there could be no recovery on it, unless it was supported by a consideration received by him.

4. That the writing showed an undertaking for the debt of another, on a past consideration, and no recovery could be had on it.

Which charges the court refused to give, because they were abstract, and charged the jury, that the plaintiff in error as trustee, had no right to depart from the provisions of the deed, in selling the property, or collecting the proceeds of sale, or to make any exchange of notes taken without the consent of the creditors, and if he did so, he could claim no advantage to himself from such departure ; and that if he had received an amount sufficient to pay all the debts, and had paid all except the debt of defendant in error, and executed to him the writing, then there was a good and sufficient consideration to support it, and defendant in error could recover. To the refusal of the court to give the charges re-

quested, and to the charge given, the plaintiff in error excepted, and now assigns them as error.

PORTER, for plaintiff in error.

The writing upon its face imported a past consideration, and indicated no intention to bind the signer. McAfee v. Click, 7 Porter, 62.

If Hughes had received money on the sale of the land, which in equity and good conscience he ought to have paid to Stringfellow, the latter, on proof of such fact, could recover as for money had and received, but not on the writing.

No counsel for the defendant.

CHILTON, J.—1. We think the facts set out in the bill of exceptions sufficiently show, that the action of assumpsit could properly be maintained against the plaintiff in error. He was required by the deed of trust, upon a sale of the land, to demand one third of the price in cash, and to take notes due in annual instalments for the residue. Having disregarded its terms, he received notes for the entire purchase money, which notes he has since exchanged for others, the last falling due some six years after the period fixed by the deed for the expiration of the credit. Having also settled up with all the other creditors, (eighteen in number,) he executed to Stringfellow, the defendant in error, and who is the only remaining *cestui que trust* in the deed, a written memorandum, stating that there was due to him nine hundred and three dollars and twenty-seven cents, from the firm executing the deed, the calculation of the amount being made to the 1st July, 1846.

As the trustee elected to receive notes in lieu of money, in violation of the stipulations of the deed, he should not be allowed, after the time of credit prescribed by the deed had expired, to say he has no funds for the satisfaction of the demands he undertook to pay. The cases of Hitchcock v. Lukens, 8 Porter, 333, and Huckaby v. May, 14 Ala. 263, are authorities to show that he is liable on upon the common counts. See also, Stewart v. Conner, 9 Ala. 803, and Strickland v. Burns, 14 Ib. 515.

2. There was no error in excluding the receipts of payments made by Hughes to the defendant in error previous to the execution of the memorandum evidencing the amount due the 6th July, 1846. This memorandum is presumptive evidence that the previous receipts were embraced in the settlement, and no proposition was made to connect the receipts with other evidence, showing a mistake in the settlement. The rule is, that when evidence which is *prima facie* irrelevant, is offered, the party seeking the benefit of it must propose it in connection with other proof, which, if allowed, would render its rejection improper. Mardis v. Shackleford, 4 Ala. 501.

3. The view we have taken of the liability of the defendant below, disposes of the question made by the charges he asked, involving the statute of frauds. His undertaking was not to answer for the debt or default of another; but to discharge a debt out of funds placed in his hands for that purpose by the debtor. The creditor having assented to this provision for his payment, and the fund being ample for that purpose, the law raises an implied promise on the part of the trustee, to pay over the fund, and *a fortiori* would sustain an express undertaking to do so. We agree with the court below, that the charges in respect to the sufficiency of the consideration, when construed in reference to the proof were abstract.

Had the plaintiff below counted also on the written memorandum, then, in the absence of proof of a consideration, so as to enable him to recover under the common counts, he must have failed, as the writing itself does not amount to an undertaking on the part of Hughes to pay the amount expressed in it: but he does not so count, and the writing is introduced as evidence under the common counts, of the amount remaining unpaid, as ascertained upon a calculation; this, taken in connection with the other proof, clearly entitled the party to his remedy. Our conclusion is, that the court properly stated the law to the jury, and the judgment is consequently affirmed.

DEAN AND WIFE v. RATHBONE'S ADM'R.

1. An administrator is not chargeable with the value of property of the estate, sold by him and delivered to the purchaser, before he has complied with the terms of sale, if the purchaser afterwards complies with the terms of the sale.
2. If an administrator, acting in the line of his duty, and within the scope of his authority, exercises good faith and ordinary diligence in regard to the property intrusted to his care, he is not responsible for a loss, occasioned by the subsequent insolvency of those who may be indebted to the estate.
3. An administrator is bound to pay due regard to the interest of the estate, and if the circumstances of a case evince a want of reasonable care and diligence, and a consequential loss to the estate, he must be held liable for it.

Error to the Orphans' Court of Madison. Before the Hon. C. C. Clay, jr., Judge.

This was a proceeding in the orphans' court of Madison, for the final settlement of the estate of R. C. Rathbone.

The legatees contended that the administrator was liable to be charged with the sum of $1,286, and interest thereon, which was due the administrator on a sealed note, executed by B. M. Lowe, and others. The material facts are, that the administrator sold the slaves of the estate, on the 5th January, 1843, on a credit till the first January thereafter, and John R. B. Eldridge, purchased three, for the sum of $1,286. This purchase was made by him, as a trustee, for the benefit of one Greene, and immediately after the sale, the slaves were delivered to Greene, who carried them to Tennessee. B. M. Lowe, at the time of the sale, was indebted to John R. B. Eldridge, as trustee of Greene, in the sum of $1,640, and it was the understanding, at the time of the sale of the negroes, that the administrator should receive the note of B. M. Lowe, with security, in payment of them. B. M. Lowe had been consulted by John R. B. Eldridge, and had agreed to execute a note with satisfactory security, payable to the administrator, for the amount he was indebted to John R. B. Eldridge.

On the day of sale, or the day after, John R. B. Eldridge handed Lowe the form of a note to be executed to the administrator, but it was not executed until the 14th June, 1843. On that day B. M. Lowe, with Fleming Jordan, and G. F. Manning, his securities, executed a note payable to the administrator, on the 4th January, 1844, for the whole amount, to John R. B. Eldridge, which was $1,640, and delivered it to the administrator. The amount of the note exceeded the amount bid for the slaves, over $300. This amount was credited on the note, in June, 1845, and John R. B. Eldridge's name is signed to the credit. This however was not paid in cash, by Lowe, nor by his securities, but John R. B. Eldridge, becoming indebted to Lowe, and being entitled to the residue of the note over $1,286, the credit was entered by way of settlement between John R. B. Eldridge and Lowe. At the time of executing the note, Lowe and his securities were in good credit, and so continued to the spring of 1845, when they became insolvent. If suit had been instituted within six or seven months after the note fell due, the money would have been made. But although the administrator spoke to Lowe about the payment of the note, during the year 1844, he did not press him for payment. In March, 1845, Lowe gave a power of attorney to confess judgment, at the next September term of the circuit court, but soon after failed, and the parties are now insolvent. The sale of the slaves took place in pursuance of the terms of Rathbone's will. There was no necessity for the immediate collection of the money, as the legatees were minors, and had no guardian to whom the legacies could be paid, and the administrator permitted many of the debts to stand out, bearing interest, and realized a considerable sum for the legatees, by not calling in the debts.

The orphans' court held, that the administrator was not chargeable with this sum of $1,286, and to reverse this decree, this writ of error is brought.

Robinson, for plaintiff in error.

It appears from the will, that Rathbone left four children. And it appears from the bill of exceptions, that one of these

had died prior to the settlement. The administrator should have made the surviving children parties, and the administrator of the dead child also a party. Ex'rs of Sanky v. Heirs of Sanky, 6 Ala. 607; Harrison v. Harrison, 9 Ala. 480; Steele v. Knox, 10 Ala. 614.

By selling the two slaves to Greene, and permitting him, without giving the bond and security required, to carry them off, and out of the state, he made himself liable for their price. Betts v. Blackwell's heirs, 2 Stew. & P. 377; 2 Ste. N. P. 1866; 2 Russ. & Mylne, 215.

By this sale and delivery, Greene became indebted to the administrator to the amount thereof. And being so indebted, the administrator could not release or discharge without becoming personally liable for the debt. 2 Step. N. P. 1860, 1862, 1866; 1 Vern. 474.

He permitted the property to pass from him without bond. and to remain so six months. Thus dealing with the property of the testator, made him liable for the debt. For he placed himself in the power of the purchaser, leaving himself no discretion as to the sufficiency of the sureties offered. Hence we are bound to infer that he intended to make himself liable. Hunter v. Bryant, 2 Wheat. 32; Betts v. Blackwell, *supra.*

Being so liable, it must be considered as any other debt, for any other cause or consideration. When so considered, the debt at its maturity must be taken as so much cash in hand. Purdom v. Tipton et al. 9 Ala. 914.

But suppose him to have had the right to take this bond, and still we contend that he is liable for the debt, upon several other grounds:

1. He failed to collect the debt on Lowe, when he by proper diligence could have done so. The bond fell due 1st January, 1844. Lowe and Jordan, two of the makers, did not fail till May, 1845. And Lowe's deposition shows, that the debt could have been collected by suit or by demand.—Powell v. Evans, 5 Ves. jr. 839; 2 Story's Eq. 706, § 1274; Lawson v. Copeland, 2 Bro. Ch. Rep. 156, 131; Tibbs v. Carpenter, 2 Madd. R. 290; Moyle v. Moyle, 2 Russ. & M. 710; Buxton v. Buxton, 1 Myl. & C. 88; Brazier v. Clark,

5 Pick. 96; Hall v. Cushing, 9 Ib. 395; Gaskill v. Hannan, 11 Ves. 497; Brazeal v. Brazeal, 9 Ala. 497.

The case of Jennings et ux. v. Weeks, 1 Rice, 453, and the case cited there are strikingly analagous, and strongly in point. When the administrator sold, he exercised the discretion given him by the will, as to the length of credit. And this exercise exhausted fully that discretion. Then by giving the longer credit, till all the parties broke, made him liable. Hunter v. Bryant, 2 Wheat. 32.

The proof shows, that one of the makers of the bond became insolvent about the time of its maturity. This should have admonished the administrator of the necessity of a speedy collection. One third of the security failed and passed away, thus to this amount lessening its value. He took no action upon the other two thirds, but stood still and let them too pass away. Surely this is negligence—*gross* negligence.

The will required that the money should be collected and paid over; and such too are the requisitions of our statutes. Clay's Dig. 196, § 22, 23, 24.

Clay & Clay, contra.

1. The administrator acted in obedience to the statute and testator's (Rathbone's) will: 1. The statute directs administrators to sell on a credit of, at least, six months. Clay's Dig. 223-4, § 13. 2. Rathbone's will left the period of credit discretionary with his executors. The administrator, with the will annexed, succeeded to the powers and duties of the executor. 1 Lomax Ex. & Adm'rs, 343; 2 Wms. Ex. 601; McCall v. Peachy's Adm'r. 3 Munf. 208. 3. The statute directs administrators to take of purchasers, bond with approved security. Clay's Dig. 224, § 13. John R. B. Eldridge bid off the negroes for certain legatees of Richard Bass, deceased, and Lowe and his securities gave their bond to Rathbone's administrator for the amount of the purchase money, and included a certain amount due J. R. B. Eldridge. Lowe's credit, at the time, was, by itself, better than J. R. B. E's, and his securities were both esteemed strong, reliable men—and such security would have been generally approved. It is not proved that any one of said securities was

suspected, at the time the bond was given. Security, apparently good and unsuspected at the time, but eventually proving bad, executor is not accountable for loss, any more than entitled to profits if it had turned out good. Brown v. Litton, 1 P. Wms. 141. Rathbone's administrator was guilty of an error of judgment only, for which, on equitable principles he cannot be held responsible. Osgood v. Franklin, 3 Johns. Ch. Rep. 27; recognized in Betts's Adm'r v. Blackwell's Heirs, 2 S. & P. 373.

2. The administrator used due diligence to secure the amount the bond demanded. On demand and refusal to pay he obtained from Lowe and his securities, a power of attorney to confess judgment. The credit of Lowe and his securities (Jordan) was still good, and continued good for two months after, with the community at large, in proof of which he purchased from citizens of Madison county, several large crops of cotton. At the time judgment was confessed, the bond had been due only about fourteen months. Moreover, Lowe had not been sued by any one on his own account, till after his assignment. The administrator's not suing earlier cannot operate to his prejudice, for the money of his estate was out (as he had every reason to believe) on good security, yielding eight per cent. interest for the benefit of the estate. Besides, the land had been sold on a credit, and the purchase money was not wholly collected, and the guardians (as before stated,) had not qualified; and hence the estate was, of absolute necessity, not ready for final settlement and distribution. 2. Only ordinary diligence is required of executors and administrators. Executors are not liable for the loss of funds of the estate, if they act with ordinary diligence—nor for mismanagement, &c. of their agents, which they could not foresee or control. Calhoun's estate, 6 Watts, 185.

3. It is not pretended that the administrator (Eldridge) ever received the amount of the bond—and administrators, (who are also considered in equity as trustees—Leavens v. Butler, 8 Porter, 380,) are not ordinarily liable for more than they actually receive.

A court of equity, according to the lord keeper, in Palmer v. Jones, 1 Vern. 144, never charges a trustee with imaginary values, or more than he has received, unless the proof be

very strong of supine negligence. Lord Thurlow said, it must amount to a case of wilful default. 1 Ves. jr. 193. Chancellor Kent's opinion in Osgood v. Franklin, 2 Johns. Ch. R. 26, 28.

4. The removal of the negroes to Tennessee, before bond and security given, did not prejudice the interests of Rathbones estate, for bond and security were afterwards given. This case differs from Betts, Adm'r, v. Blackwell's Heirs, 2 S. & P. 373, in this respect; for the purchaser in the latter case, was unable to give bond *with security*, and security never was obtained.

DARGAN, J.—The plaintiffs in error contend, that the administrator became liable for the value of the slaves, by permitting Greene, for whose use they were bought by Eldridge, to take them into his possession, and to remove them from the State, before the bond stipulated to be given for the purchase money had been executed. If the bond, and security agreed to be given, had not been afterwards executed, the administrator would unquestionably have been liable. Betts v. Blackwell, 2 Stew. & Por. 373. But we cannot hold the administrator personally liable for delivering the goods purchased at his sale, if the purchaser in a short time afterwards, executes the security required by the terms of the sale. For if the purchaser, after he receives the possession of the goods, gives the security required, it is a compliance with his contract, and if the purchasers comply with the terms of sale, the administrator cannot be charged with negligence, merely because the purchaser received the possession of the goods, before the security required was executed.

2. By the terms of the sale, a credit of twelve months was allowed the purchasers. The bond which was given for the purchase money of the three slaves bought by Eldridge for Greene, fell due the first of January, 1844, had suit been instituted on it at any time within six or seven months after its maturity, the money would have been made; but the principal, and one of the securities, being considered entirely solvent, the administrator did not commence suit during the year 1844. In March, 1845, the makers executed a power of attorney to confess judgment, at the next September term

of the circuit court, but shortly after failed. The plaintiffs in error insist, that the omission of the administrator to sue during all the year of 1844, is such negligence as should charge him with the amount of the bond. What acts, or omissions, will constitute such negligence, as will render an administrator, guardian, or other trustee, personally liable, is a question on which there is such a number of authorities, that it is almost as difficult to collect them, as it is to reconcile them. But I think the rule to be extracted from them is this: If an administrator, or any other trustee, acts within the scope, and on the line of his duty, and exercises good faith, and ordinary diligence in regard to the property entrusted to his care, he is not responsible, although loss befall the estate, by the insolvency of those who may be indebted to it, or who may have possession of the property belonging to it. Clough v. Bond, 3 Mylne & Craig, 496; 2 Story's Eq. 511, 512; 2 Johns. Ch. Rep. 76; 4 Johns. Ch. R. 619. Applying this principle of law to the facts of this case, we cannot hold the administrator liable. In selling the slaves, and giving credit, he was acting in accordance with the provisions of the will, and within the line of his duty. The bond was good at the time it was received, and the credit of the principal, and one of the securities, was not doubted, until about the time, or just before their failure. There was no immediate necessity to call in the money, for any purpose required by the estate, and perhaps no one during the year 1844, would have considered the bond a doubtful security. Under such circumstances, a prudent man, without subjecting himself to the charge of negligence, or a want of ordinary care, might decline to sue, or to call in the money.

We cannot apply the stringent rule, that an administrator must in all cases sue immediately, if the debts due the estate be not paid at maturity. He must be allowed a reasonable discretion, whether to sue immediately or not. To say that an administrator must in all cases sue immediately, if the debts of the estate be not paid at maturity, would often involve estates in unnecessary expense, which might be avoided by a short delay, without hazard or inconvenience.

In the exercise of his judgment, however, *whether to sue or not*, he must have a due regard to the interest of the es-

tate, and if the circumstances evince a want of reasonable care and diligence, by means of which loss befalls the estate, the administrator must be held responsible, as this administrator, in taking the bond and security, did not violate his duty; and as his failure to sue the bond, under all the circumstances, does not show a want of reasonable care and diligence, we cannot charge him with the loss.

Let the decree of the orphans' court be affirmed.

GREEN, ADM'R OF FAGAN, Jr., v. THE DISTRIBUTEES OF FAGAN, Sr.

1. It is the duty of an administrator to defend the estate he represents, against claims, which he believes are unjust, and if, under an honest impression that a demand against it ought not to be paid, he incurs expenses in litigating it, they should be allowed him in the settlement of his administration accounts.
2. If an administrator, having a good defence to a claim preferred against the estate, neglects to interpose it, but suffers judgment to go against him, and in consequence of such neglect, he is compelled to resort to further and other proceedings, to relieve himself of the judgment, the expenses of such subsequent litigation do not constitute a proper charge against the estate.
3. If an administrator is aware of a credit, to which the estate of his intestate is entitled, on a claim presented against it, but neglects to avail himself of it, and permits judgment to be entered against him for the whole amount of the claim, he is personally chargeable to the extent of such credit.
4. Where a petition for final settlement and distribution of an estate is filed in the names of the widow and other distributees of the deceased, it is not error to refuse to dismiss it on motion of the widow alone.
5. A decree rendered by an orphans' court, in favor of an infant distributee, should be in his name, by his guardian, if he have one, but if it be in his name alone, without the intervention of a guardian, it is not reversible on error.
6. Where the decree of an orphans' court in favor of an infant distributee, without the intervention of a guardian, directs execution to issue thereon, the award of execution is erroneous.

7. Since the passage of the act of March, 1848, "securing to married women their separate estates, and for other purposes," a decree of an orphans' court for the distributive share of a married female distributee, should be in the names of the husband and wife, for the use of the wife.

Error to the Orphans' Court of Benton. Before the Hon. Robert H. Wilson, Judge.

This cause commenced by the filing of a petition in the court below, in the names of the distributees of William Fagan, jr., deceased, praying that the plaintiff in error, who was administrator of the estate, be compelled to make final settlement of his administration, &c. At the trial, the widow of the deceased, one of the distributees, moved to dismiss the petition, on the ground that she had not signed it, or authorized any person to do so for her, which motion the court overruled. In the course of the settlement, it appears, that the plaintiff claimed a credit for costs, &c. incurred in defending a suit instituted against him in his representative character by one Riggs, on a note made by his intestate in his life time, and in support of the claim, proved, that he had been advised by the widow of the deceased, and other of the distributees, that the demand was unjust, and ought not to be paid, unless first established by suit, but the court refused to allow the credit. It further appears, that one Rainey, administrator of William Fagan, sr., commenced a suit against plaintiff's intestate in his life, which was revived after his death, against plaintiff as his administrator, on a note that said William Fagan, jr., had given to said Rainey, administrator, for a slave sold by the latter to the former: that the plaintiff interposed as a defence, a payment of $100, made by his intestate on said note, for which he held said Rainey's receipt, and that the defence was withdrawn on the promise of said Rainey to allow the credit on the note, but which promise he violated, and took judgment for the full amount of the note: that execution issued of this judgment, *de bonis intestatis*, and was returned no property, and that a suit was then commenced against plaintiff and the securities on his administration bond, suggesting a *devastavit*, upon which judgment was recovered against them for the full amount of the judgment, that had been rendered against plaintiff in his

representative character: and that subsequently to the rendition of this last judgment, plaintiff, under the advice of counsel, filed a bill in chancery to enjoin its collection, on the grounds that William Fagan, sr., who died in Georgia, did not die intestate, but left a will, in which he appointed an executor, that such executor had duly qualified, and taken upon himself the administration of the estate, and that the grant of administration to said Rainey was consequently illegal and void. This bill is still pending, and the plaintiff has incurred considerable expense in its filing and prosecution, in the way of solicitor's fees, &c. On this state of facts, the plaintiff claimed credits:

1. For the whole amount of the judgment rendered against him and his securities, including the $100 paid by his intestate, interest and costs.

2. For the expenses incurred by him in the chancery suit. The court allowed him a credit for the original amount of the judgment and costs against him as administrator, less the $100 payment, but refused to allow him credit for that, or any subsequent expenses to which he had been subjected.

The distributees asked the court to charge the plaintiff with the sum of $87, as interest on money of the estate appropriated by him to his own use, which was accordingly done, but the record does not disclose the evidence upon which the court acted. Judgments were rendered for the several distributive shares. Those in favor of the infant distributees were rendered in their own names, without the intervention of a guardian, and those in favor of the married female distributees, in favor of their respective husbands in right of their wives, and executions were ordered to issue, &c. The several rulings of the court, as above set forth, were excepted to on the trial, and are now, together with the judgments rendered, assigned as error.

Rice & Morgan, for plaintiffs in error.

1. The court erred in rendering judgment in favor of Elijah Jordan, in right of his wife, who was a distributee. Hudson v. Parker, 9 Ala. R. 459; Petty v. Wafford, 11 Ala. 145.

2. The court erred in rendering judgments in favor of the

several minor heirs of William Fagan; and awarding execution to them without mentioning their guardian. McLeod v. Mason, 5 Por. 223; Sutherland v. Goff, Ib. 508; Sankey v. Sankey, 6 Ala. 607.

3. The litigation with Rainey by the plaintiff in error, was had in good faith, for the purpose of preventing irreparable injury to the estate; and the costs expended by Green in such litigation, should have been allowed to him. Bettis v. Taylor, 8 Por. 574; Fitzpatrick, adm'r, v. Hill, 9 Ala. 787. See also Treadwell v. Rainey, 9 Ala. 590, to show that Rainey was not entitled to his recovery. See Harris v. Martin, 9 Ala. 895.

4. Green, in defending a suit against the estate, became personally liable for the debt, and the court should have allowed him the whole amount of the judgment against him as a credit on his account. The Riggs note was defended at the instance of the distributees, and the costs should have been allowed the administrator.

J. B. Martin, for defendants.

1. Where an administrator, by unnecessary litigation, involves himself in costs, using his name as administrator, it cannot be made a charge against such estate. O'Neil v. Donnell, 9 Ala. 734.

2. The intestate of plaintiff in error, having recognized the right of Rainey to sell as administrator, by purchasing at his sale, retaining the possession of the property, and making no offer to return it, he nor his representative can defend, when sued for the purchase money. 3 Por. 126; 19 Johns. 77; 6 Ala. 399.

3. Rainey's right to the administration could not be collaterally impeached; and the purchaser at his sale, as such, would take a good title. Wyman et al. v. Campbell, 6 Por. 219; 5 Ala. 264; 6 Ala. 399.

4. The judgment first obtained in the orphans' court in favor of Rainey against plaintiff in error, was ample indemnity for him against the distributees of the estate, and fully authorized him to pay it off; and the fact of his suffering judgment to go against him by default, was conclusive that he held assets sufficient to pay it off; consequently, the two

suits, the one in the circuit, and the one now pending in the chancery court, were voluntary, and unnecessary on the part of the administrator, for which he is alone responsible. 14 Peters, 33; 8 Wheaton, 671; 1 Phillips, 358; 3 Stew. 285; 2 Bibb, 209; Hardin's Rep. 404.

5. The proof fully shows that the plaintiff in error was not entitled to an allowance for the $100 for which he holds a receipt, and admits to have been paid. 4 N. Hamp. 208.

6. The court properly refused to allow the several vouchers set out in the bill of exceptions. O'Neil v. Donnell, 9 Ala. 734.

7. As to the computation of interest, see 9 Ala. 491; 11 Ib. 521.

8. The decree was properly rendered in favor of the minor heirs. Ex'rs of Sankey v. Heirs of Sankey, 6 Ala. 607.

9. Where there has been a clerical misprision in the proceedings below, which that court would amend on motion, and the record presents the facts as they should be, this court will amend it at the cost of the plaintiff in error. Clay's Dig. 322, § 54; Sellers v. Smith, 11 Ala. 264; Lucas and wife v. Hamilton, 13 Ala. 448; Smith v. Robinson, 11 Ala. 271.

COLLIER, C. J.—An administrator is bound to defend the estate of his intestate against claims which he believes to be unjust; and if, under an honest impression that a demand is not a proper charge, he employs counsel, he is entitled to charge a reasonable fee against the estate. Davis v. Rawlins, 2 Harring. Rep. 125. Although he is unsuccessful in the suit, yet if he litigated the question of liability in good faith, he shall be reimbursed his costs from the assets of his intestate. Bettis v. Taylor, 8 Port. Rep. 564.

It is fairly inferable from the record before us, that the administrator was entirely justifiable in his refusal to pay the claim of Riggs. The widow, and perhaps some of the distributees, advised him not to pay it, expressing the belief that it was unjust, that they had never heard of it, &c. This admonition, in the absence of all knowledge on the part of the administrator, as may be fairly intended, was quite enough to have authorized him, as a prudent man, to require Riggs to establish his claim by suit. In making defence

against this demand, it does not appear that he incurred any unnecessary expense, and the orphans' court should have made the proper allowance. Instead, however, of doing this, the charge for costs was wholly rejected.

In respect to the judgment in favor of Rainey, administrator, &c. there can be no question, that if the grant of administration to Rainey upon the estate of William Fagan, sr. was void, as seems to have been held by this court in Treadwell v. Rainey, 9 Ala. Rep. 590, no title in the slave (the consideration of the note upon which the judgment was founded) passed to the intestate of the plaintiff, beyond the life estate of the widow of the elder Fagan. This being the case, it was the duty of the administrator to have defended, and to have enabled him to do so, he should have acquired a knowledge, or at least endeavored to obtain the necessary information previous to the rendition of the judgment. Although it may be that he will make a successful resistance to the recovery of the judgment now pending in chancery, yet the estate should not be charged with the additional counsel fees and costs resulting from the protracted litigation subsequent to the judgment against him in his representative character. These charges are but the consequences of his inattention and neglect.

The record does not discover that the slave referred to, ever went into the hands of the administrator, and has been sold by him as a part of his intestate's estate, or that he is in any manner liable to account for it to the true owner. We cannot therefore assume, that he should be allowed to retain from the estate for his indemnity. Besides, if we are permitted to refer to the facts of the case in 9 Alabama, which we understand to be adopted as if part of the record, it may be asked if it does not appear, that the widow of Rainey's intestate, who had a life estate in the slave at the time of the sale, did not estop herself from asserting her title; and if she was living when the slave was sold by the plaintiff in error, could he be charged for a conversion? Lewis v. Mobley, 4 Dev. & Bat. R. 323; Caldcleugh v. Hollingsworth, 8 Watts & Serg. Rep. 302; Poag v. Carroll, Dudley's Rep. (S. C.) 1.

But it is needless to consider these suggestions, as in the condition of the record before us, we cannot say that the ad-

ministrator is entitled to a credit for a greater sum than the judgment first recovered against him, and this, it seems, has been allowed.

As for the $100 which were paid by the intestate in part satisfaction of the debt on which the judgment was rendered, it seems that the administrator was aware of the payment, and allowed Rainey to take his judgment for the full amount of the debt, upon the promise that that sum should be credited. The credit has not been formally entered, but the administrator holds a receipt acknowledging it, and this is quite sufficient. But if it were otherwise, the distributees cannot be prejudiced by the failure of the administrator to avail himself of the payment previous to the rendition of the judgment.

We cannot say, from any thing shown to us, that the charges and allowances for interest are incorrect; but as the case must be sent back, we would merely remark, that attention to our numerous decisions must lead to a correct conclusion, should there be further controversy upon this question.

The motion to dismiss the petition for a distribution, because the widow was unwilling to prosecute it, was rightly denied—it was altogether competent for the other distributees to proceed for their own interests.

In respect to the several parties in whose favor the decree is rendered, the several distributive shares of the children, should have been adjudged to those who were in their minority, to be paid to them through their *general guardians*, if they had such guardians; but a decree which mentioned such children alone, as entitled to their distributive shares, is not reversible on error. It may be that *general guardians* had not been appointed, and if they had, or should be afterwards, their names could be suggested upon the record, and executions ordered to issue in the names of themselves and wards. But the order for an execution to issue in favor of the children is certainly erroneous.

The decree in favor of the female distributees who are married, should not have been that their husbands recover in right of their wives, but that the husband and wife recover for the use of the wife. This modification in the form of a

decree in such a case, is made necessary by the act of March, 1848, "securing to married women, their separate estates, and for other purposes." See Key, adm'r, v. Vaughn et al., at this term. How far it is allowable to amend the irregularities in the decree, will appear from this citation.

For the error in ordering executions to issue in favor of the infant distributees, if it be not amendable as a clerical misprision under the statute, it could be corrected by reversing and rendering. But the record does not inform us the amount of the costs which should have been allowed for the defence of the suit by Riggs, and consequently, the correction cannot be here made by rendering such a decree as the orphans' court should have rendered. The decree must therefore be reversed, and the cause remanded.

GRAHAM AND TAYLOR, ADM'RS, v. CHANDLER ET AL.

1. The withdrawal of a plea, and the substitution of others by a defendant, is a matter of discretion with the primary court, and not revisable on error.
2. An execution issued in the name of a sole plaintiff, who is dead at the date of its issuance, is a nullity, and a sheriff is not liable for failing to execute it.

Error to the Circuit Court of Perry. Before the Hon. John D. Phelan.

THIS was a motion made by the plaintiff, as administrator, &c., of James Abercrombie, deceased, against the defendant, as sheriff of Perry county, for failing to make the money, &c. on an execution that came to his hands in favor of the said Abercrombie, against one Billingsley. The defendant filed several pleas, and the case having been continued from term to term, at the trial term, the defendant moved the court for leave to withdraw the pleas previously pleaded by him, and to substitute, which motion was granted, and the plaintiff ex-

cepted. The defendant then filed several pleas—the third of which was, "that before, and at the time of the issuance of said execution, the said James Abercrombie, the plaintiff therein was dead," &c. To this third plea the plaintiff demurred, and the court overruled the demurrer, and the plaintiff failing to reply, or to take issue, judgment was rendered for the defendant. The granting of leave to withdraw the first, and substitute other pleas, and the overruling of the demurrer, are now assigned as error.

Peck and Graham, for plaintiffs in error.

The demurrer to defendant's plea on the first trial, raised the question of the sufficiency of the rule against the sheriff. On the second trial, there was an express motion to quash the notice, or rule. It was wrong to permit the defendant, after five years litigation, to withdraw his defence and begin *de novo*. He could not place the plaintiff back with him.

But upon the question raised, the law is with the plaintiff. An execution issued after the plaintiff's death is not void, but voidable. Moore & Cook v. Bell, 13 Ala. 469; 3 Bac. Abr. 716, 704; 4 Wheat. 339; 1 U. S. Dig. 744; 9 Watts & Serg. 182; 1 Green, 193; 1 Cowen, 33; Ib. 711; 1 Dyer, 76, note; 2 Ld. Ray. 768; 2 Brevard, 417; 1 Ire. Dig. 443; 1 Murp. 492; 2 Bibb, 198.

2. Under what process may sheriff justify, and what is he bound to execute? Watson v. Watson, 9 Con. 140; 12 Wend. 96; 2 N. & M. 211; 3 Caines, 273; 3 Wilson, 345.

3. The plaintiffs, as representatives of the deceased, have a right to this motion. 8 Porter, 181. But if not, it is too late to object to plaintiffs' capacity to sue. In Gary v. Bates, 12 Ala. 544, the court sustained a similar motion in the name of the assignee of a bankrupt, the plaintiff in the *fi. fa.* being civily dead when it issued.

Moore and Brooks, contra.

1. The record discloses no sufficient cause of action. The suit being instituted to recover a penalty under the statute, and the plaintiff being dead, the action dies with him, and does not survive to his administrators. The revival of such

an action is not authorized by statute, nor is it known to the common law. See Logan v. Barclay, 3 Ala. R. 361; 5 Ala. 423; 6 Ib. 375; 2 Pick. 527.

2. An action against a sheriff for a *non-feasance* does not survive, but dies with the plaintiff or defendant, as the sheriff is no gainer by the *non-feasance.* See Cravath v. Plympton, 13 Mass. 454; 1 Bay. 59; 1 Root, 216; 5 Pick. 290; 1 Cain, 124.

3. This proceeding by motion is a summary remedy, and according to all the decisions of this court, on this class of cases, the remedy cannot be extended by construction, beyond the terms of the statute. See Murphy's Adm'rs v. Br. Bank Mobile, 5 Ala. 423; 6 Ala. 247.

4. It was within the discretion of the court to allow the defendant to withdraw his pleas to the merits of the cause of action, and to allow him to demur, or plead to the notice, at any time before the final hearing of the cause, and that even after a mis-trial, or new hearing granted. See Webster & Smith v. Wyser, 1 Stewart 184; 3 Stew. 226; 5 Ala. 64.

5. The circuit court exercises a just discretion over all matters of pleading, which will not be reversed in this court. 9 Porter, 232.

8. The sheriff may successfully defend himself against a motion for not making the money on a *fi. fa.*, either by showing that there was no judgment on which said *fi. fa.* could issue, or by showing that the *fi. fa.* was void. See Holloway v. Johnson, 7 Ala. 660.

7. If the plaintiff be dead, and the administrator is not a party to the record, he shall not have an execution. See 8 Bacon, 609; 1 Mur. 113.

8. In a rule against the sheriff, a motion to quash the execution will be considered as made, when the matter alledged in defence would be available on a motion to quash. Graham and Taylor, adm'rs, v. Chandler, 9 Ala. 625.

CHILTON, J.—1. There was no error in permitting the withdrawal of the former pleas, and the filing of new pleas by the defendant in error. This was a matter within the discretion of the primary court, and consequently cannot be

made the ground of reversal here. Crawford v. Chandler, 5 Ala. 61.

2. The demurrer to the third plea presents the question, whether if an execution issue in favor of a sole plaintiff who was dead at the time of its issuance, the sheriff is bound to execute it. For the plaintiff in error it is insisted, that the execution was irregular, and voidable at the election of the defendant therein, but not absolutely void; and we have been referred to the case of Day v. Sharp, 4 Whar. Rep. 339, and Darlington v. Speakman, 9 Watts & Serg. 182. In the first case, the supreme court of Pennsylvania hold, that an execution issued in the name of a plaintiff who is dead, and without a *scire facias*, to substitute his representatives, is not absolutely void, and that the party may justify under it. The other case affirms substantially the same doctrine. These cases were doubtless influenced by the statute of Pennsylvania, in respect to the revival of judgments in cases where the plaintiffs have died, and cannot be regarded as correct expositions of the law in this state. This court has repeatedly held, that an execution which issues against a sole defendant who is dead, there being no lien created by the issuance of previous executions, is a nullity, and is absolutely void. Collingsworth v. Horn, 5 Stew. & Por. 237; Holloway v. Johnson, 7 Ala. Rep. 660; Henderson et al. v. Gandy's Adm'r, 11 Ala. Rep. 431; Moore & Cock v. Bell, 13 Ala. Rep. 459. In the case last cited, we held, that an execution could not be sued out in the name of a plaintiff after he is dead, and that if one did issue, is should be quashed on motion. The point under consideration was however fully considered in Stewart v. Nuckols, at the present term of this court, and it is there held, that the execution issuing after the death of the plaintiff is a nullity. See also, Nicholson v. Burke, at this term. These decisions are decisive of this point, and are conclusive to show, that the sheriff is not liable for failing to make the money upon the execution specified in the suggestion exhibited against him, if the facts specified in the third plea be true, and the demurrer admits their truth.

As this point is decisive of the case, it becomes wholly

unnecessary to examine the other questions raised by the counsel.

Let the judgment be affirmed.

THOMPSON v. BONDURANT AND KING.

1. Where there is judgment against two, or more, and one defendant dies before execution issued, it may be issued against all, but can be levied on the goods of the survivors only.
2. To authorize the issue of execution against the surety of an administrator, the bond of the administrator, rendition of a decree against him, the issue of execution against him, and return of no property thereon, must appear of record before the bond can have the force and effect of a judgment. If any of the sureties to the bond die before all these facts appear of record, no statute judgment can be rendered against them.
3. Where an execution issues against the sureties of an administrator, some of whom were dead before the statute judgment was rendered, the court should not quash the execution for this cause, but amend, by striking out their names.
4. When a sheriff is appointed administrator, and assumes to act under the order, by receiving the assets, he is estopped from denying that he is administrator, though letters of administration were not issued to him.

Error to the County Court of Marengo. Before the Hon. James A. Young, Judge.

An execution issued on the 27th day of May, 1846, in favor of Sarah Thompson, the plaintiff in error, from the orphans' court of Marengo, against James M. Bondurant, late sheriff of said county, and by virtue of his office, administrator *de bonis non* of Nicholas Thompson, deceased, on a decree rendered against him, in favor of the plaintiff in error, as one of the distributees, for $272; which decree was rendered on the second day of February, 1846.

On the 9th day of July, 1846, the sheriff returned the exe-

cution no property found. On the 25th day of September, 1847, an execution was issued against his securities, as sheriff, on his official bond, reciting the decree, and the return, and commanding, that the amount of said decree be made out of their goods, &c. On the 6th of October, 1847, a motion was made to quash the execution, on the following grounds:

1. That David Curry, Austin Eskridge, John Rains, and Charles P. Lee, who were joint securities of Bondurant, as sheriff, with King, died before the rendition of said decree.

2. Because they died before the issuance of the execution against Bondurant.

3. Because they died before the issuance of this execution.

4. Because no execution was issued against these, defendants, until more than a year and a day had elapsed from the time the decree was rendered.

5. Because no execution had issued for more than a year and a day from the time the execution was returned no property.

6. Because the cause of action against Bondurant did not accrue within six years before the rendition of said decree.

7. Because the liability against Bondurant did not accrue within six years before the issuance of the execution against them.

8. Because, in said decree, Bondurant was charged with more than came to his hands as administrator.

9. Because assets to the amount of the decree, never came to his hands.

10. Because the distributive share of the plaintiff, did not amount to as much as the decree rendered in favor of the plaintiff.

11. Because the said Bondurant was not administrator of the estate of said Nicholas Thompson, deceased.

12. Because the said Bondurant was charged with the sum of $272, being the amount of a promissory note given by the plaintiff, for the purchase of property of the estate, and which had not been collected.

The plaintiff, waiving all objections to the form of these allegations, as grounds to quash the execution, by way of demurrer, insisted, that the first, second, third, fourth, fifth,

sixth, seventh and twelfth grounds, alledged by the defendants, were insufficient in law to authorize the court to quash the execution; and also moved the court to strike out the eighth, ninth and eleventh allegations.

The court overruled the motion to strike out the eleventh plea, but struck out the eigth, ninth and tenth; and also overruled the demurrer to the first, second and third; but sustained the demurrer to the fourth, fifth, sixth, seventh and twelfth pleas of the defendant. Issue was then taken by the plaintiff on the eleventh, a trial was had, and the court quashed the execution.

The testimony introduced by the plaintiff, was an order of the orphans' court, as follows: At an orphans' court, held on the first Monday of January, 1836, it is ordered, that letters of administration issue to James M. Bondurant, sheriff of Marengo county, on the estate of A. W. Thompson, deceased; and also the decree, on which the execution against Bondurant issued.

It also appeared from the minutes of the orphans' court, that in 1834, letters of administration on the estate of Thompson, issued to David Dunlap, who afterwards resigned, and settled with the court; and that James M. Bondurant, who was then sheriff of Marengo county, was appointed administrator *de bonis non*, and the notes and accounts in the hands of Dunlap, uncollected, were delivered over to him.

In August, 1838, the term of Bondurant's office as sheriff expired. He was succeeded by David Curry, and after his term of office expired, Dubose was elected sheriff. Neither Curry nor Dubose ever were appointed administrator by virtue of their office, but Dubose undertook to perform the duties of administrator, by virtue of his office, and in 1843, made a settlement of the effects that came to his hands, belonging to the estate. In March, 1845, citations were issued to Curry and Bondurant, to make final settlement. Curry appeared, and denied he had ever been appointed, or had received any effects by virtue of his office. Bondurant did not appear, and an account was stated against him, charging him with the amount of the notes and accounts delivered to him, and with the rent of land, for the years 1836 and 1837. On the day the final decree was rendered, Bondurant appeared

and contested the accounts, and also insisted that there was no resignation of Dunlap on file; but there was an account on file, in which he was described as late administrator. It was also shown, that Bondurant, as administrator, receipted for notes and accounts, and collected some money; but no letters of administration were in fact issued to him, in pursuance of the order of the court in 1836.

The court quashed the execution, and to reverse the judgment quashing the execution, this writ of error is taken.

Manning, for plaintiff in error.

The court will observe that the issues in the court below were formally tendered by allegations or pleadings in writing, filed by defendants in error, and upon which, issues in fact or in law were taken. To those issues, therefore, they are restrained. If the court below erred upon them, they are the cause of its errors, and ought to be visited with the consequences. It is not expected, when the actors in a proceeding present their issues in the most formal mode known to the law, that the adverse party will prepare the case upon other points that might possibly be raised, although he were fully able to defend them by proof. To let them go out of the questions thus formally made, and that after the case comes to the supreme court, is not only giving to it original jurisdiction upon those new questions, but would enable parties to take most unjust advantages, and to involve their adversaries in undeserved costs in this court.

The county court for orphans' business, is established for the very purpose of taking care of the interests of infants and distributees, and all intendments in relation to its proceedings should be made in their favor.

Brooks & Byrd, contra.

1. An execution cannot regularly issue on a judgment against joint debtors where one has died, without suggesting the death upon the roll. Cawthorn v. Knight, 11 Ala. 579.

2. After the execution has been returned no property found against the administrator, the plaintiff must issue an execution forthwith within a year and a day thereafter, or on motion it will be quashed. Ibid.

3. No execution can issue against the sureties of a sheriff on the bond, as an administration bond, but the statute provides that it may be sued upon. Clay's Dig. 222, § 10.

4. Where any of the sureties to the bond are dead at the time of the decree against the sheriff as administrator, or where any of them are dead at the time of the return of "no property found" against the administrator, it is irregular for an execution to issue against them; for it is only in cases where any of the parties to the judgment die after judgment, that a suggestion of death upon the roll can be made, and execution issued. Woodcock v. Bennet, 1 Cowen, 711; Holloway v. Johnson, 7 Ala. 660.

6. Letters of administration are necessary to perfect the appointment of an administrator, and as he had not the authority to collect the debts, his sureties are not liable for the loss occasioned by the neglect or refusal of the orphans' court to issue letters. Williams on Ex'rs, 239, 396.

7. If the court is of opinion that the court below quashed the execution for a wrong reason, still, if from the record it appears that the execution should have been quashed, this court will not reverse the judgment, and as the execution was improperly made returnable to the orphans' court, instead of the county court, the court below should have quashed it. Abercrombie v. Chandler, 12 Ala. 829.

DARGAN, J.—The defendants alledged twelve grounds, called pleas in the record, why the execution should be quashed. The plaintiff, by way of demurrer to some, and by motion to strike out others, insisted, that all of them were insufficient to authorize the court to grant the motion. The court decided them all to be insufficient *to quash the execution*, except the first, second, third, and eleventh pleas; these were decided to be sufficient in law to quash the writ.

The plaintiff then took issue on the eleventh plea, but not on the first, second, and third. It seems that a trial was had on this issue, and the proof introduced in support of this plea, and also to prove it untrue in fact, is made part of the record by the bill of exceptions.

The court granted the motion, and quashed the writ, and therefore, to determine whether the court erred, or not, we

must examine the legal sufficiency of the first, second, and third grounds alledged by way of pleas, and also must determine whether the evidence shows the eleventh plea, to be true in fact.

The first ground alledged by way of plea, is, that Curry, Eskridge, Rains, and Lee, four of the securities of Bondurant, as sheriff, died before the final decree of the orphans' court was rendered against him; and as the execution purports to be issued against these, as well as against the other securities, there is no judgment to support it.

The rule of practice is well settled, that if a judgment be rendered against two, or more, and one defendant dies before execution is issued, it may be issued as against all the defendants, but can be levied on the goods of the survivors only, and is in fact an execution against them alone; but as it corresponds with the judgment, it is regular, and cannot be quashed. 3 Bibb's Rep. 334; Davis v. Helm, 3 S. & Marsh. 17. But an execution must follow, or correspond with the judgment as to the parties, and if issued against two, but the judgment is rendered against one alone, the execution will be quashed. 2 J. J. Marsh. 137.

Guided by these rules, it is only necessary to determine, whether the bond, on which the execution issued, had the force and effect of a judgment against all the securities, against whom the execution purports to have been issued.

When a final decree has been rendered in the orphans' court in favor of a distributee, against an administrator, and an execution has been issued thereon, and returned no property, the bond given by the administrator, has the force and effect of a judgment, and execution may issue against all the obligors. Clay's Dig. 304. The bond, the rendition of the decree against the administrator, the execution, and the return thereon, no property by *the sheriff*, are the *matters of record constituting the judgment;* and all the facts must appear of record, before the bond can have the force and effect of a judgment; and if one of the securities to the bond die, before all these facts appear of record, the bond can not have the force and effect of a judgment against him; because no judgment can be rendered against one, not *in esse*, And if the bond did not have the force and effect of a judg-

ment against these seeurities, at the time of their death, nothing subsequent to their death, could give it the effect of a judgment against them. As the first plea shows the death of these four securities before the decree even, was rendered against Bondurant, it shows that there was no judgment against them at the time of their death, and consequently the execution does not correspond with the judgment as to parties. But instead of quashing the execution, because it did not correspond with the judgment, as to parties, it was the duty of the court to have amended it, by striking out the names of those against whom the bond did not have the force and effect of a judgment, during their life. Cawthorn v. Knight, 11 Ala. 579; Sheppard v. Melloy, 12 Ib. 561. The court therefore erred in holding the first, second and third grounds, alledged, sufficient in law to quash the execution.

The eleventh ground alledged, why the execution should be quashed, is, that Bondurant was not administrator. The evidence shows that Dunlap had been appointed administrator in chief, who settled his accounts, and resigned, but no resignation in writing was found of record.

The minutes of the orphans' court, show an order, directing letters of administration to be issued to Bondurant, as sheriff. It was shown that he was sheriff, and under this order received the notes, and accounts, that had been collected by Dunlap, and gave his receipt for them as administrator. In the case of Henry v. Brasher, 8 Porter, 559, it is said, that "letters of administration are but the evidence of the authority of the administrator, and he may act without them, if the record shows his appointment."

We think it clear, that if the orphans' court orders letters of administration to issue to one, and he complies with the statute, by giving bond, and then assumes to act as administrator, that neither he, nor his securities can object, when sued on their bond, that letters in fact did not issue to him. As Bondurant was sheriff, he was not required to give a new bond. His official bond as sheriff, became his bond as administrator, and as he assumed to act, under the order of the orphans' court, as administrator, and received the assets not administered by the administrator in chief, giving his receipt

for them as administrator, he is estopped from denying that he was administrator.

These are the only questions we can examine on this record, and our conclusion, is, that the court erred in quashing the execution, but should have overruled it, so that it might correspond with the judgment as to parties.

Let the judgment be reversed, and the cause remanded.

NICOLSON v. BURKE.

1. A judgment was rendered against S. R., in favor of W. & C., upon which execution issued against S. R., which being levied on a slave, he gave a forthcoming bond for its delivery, with B. as his surety. The judgment is described in the bond as having been rendered against S. R. and B., and being returned forfeited, and an execution having issued thereon against S. R. and B.—Held, that the discrepancy between the bond and the execution was so great, that no execution could issue upon it, and that a sale of land made under it, would be set aside.

Errror to the County Court of Marengo. Before the Hon. James A. Young, Judge.

This was a motion by defendant against plaintiff in error to quash an execution, and set aside a levy and sale made under it. A judgment was rendered in the county court of Marengo, in favor of Walke & Clarke, use of Wm. Cain & Co. against Spencer Roane, for $328 18 debt, $21 85 damages, and $6 56 costs, on which an execution issued against said Roane, on the 20th December, 1839, and was returned with the indorsement, "levied on a negro girl, Jane, and forthcoming bond taken and forfeited, the first Monday of April, 1840." The forthcoming bond that appears in the record, bears date March 7th, 1840, is executed by Spencer Roane and John Burke, the defendant in error, and describes an execution issued on the 20th December, 1840, from the county

court of Marengo, in favor of Walke & Clarke, against Spencer Roane and John Burke, for $351. After the issuance of two other executions, a pluries issued on the 5th October, 1846, in favor of Walke & Clarke against Spencer Roane, and John Burke, his security on the delivery bond, for the sum of $350 03, debt and damages, and was levied on several tracts of land as the property of Burke, of which plaintiff in error became the purchaser at the sale by the sheriff. Roane died in the summer of 1840, and no execution had issued on the judgment between January, 1841, and September, 1846. Burke, on due notice to the plaintiff in error, moved the court below, at its fall term 1848, to quash the execution last issued, and to set aside the levy and sale made under it. The motion was sustained, and the order entered in accordance therewith. This action of the court is now assigned as error.

Ormond, for plaintiff in error.
No counsel for defendant.

COLLIER, C. J.—In Lunsford et al. v. Richardson & O'Neal, 5 Ala. 618, it was decided, that the proper course to be pursued for the purpose of avoiding a forthcoming bond, or detroying the effect of an execution issued thereon, was by motion to the court to which it was returnable. The execution in that case issued against the goods, &c. of John Lunsford and three other persons, and the bond described it as having issued against the goods, &c. of John Lunsford, only; the aggregate of debt, damages and costs which it required to be made was $2,492 50, and the bond states the amount to be $2,743. The court said, "these discrepancies it is believed are so great, that we cannot say from an inspection of the execution in the record, that it is the writ to which the bond refers. The misdescription is such, that it cannot be identified with reasonable certainty; the execution being placed out of the way, there is nothing to sustain the bond, and the circuit court should have quashed it." So in Moffitt and Watson v. The Branch Bank at Mobile, 7 Ala. Rep. 593, it was held that a judgment and execution against Elisha Moffitt and another person, will not sustain a forthcoming

bond which describes a judgment and execution against Elisha Moffitt alone. "This discrepancy," say the court, "is so great, that we cannot say that it is the execution and judgment described in the bond, and it does not therefore appear that there was any authority for taking it."

If an execution be issued in the lifetime of the defendant, the lien may be continued after his death by an *alias* or *pluries fi. fa.;* but if there be a chasm by the lapse of a term during which there was no execution in the officer's hands, an *alias* cannot issue, but the judgment must be revived by *scire facias* against the personal representative. Bond, Adm'r v. Dennis. 6 Ala. Rep. 55. Although there be a plurality of defendants in the judgment, the rule will be the same in respect to the one who is dead. Jones, adm'r v. Swift, 12 Ala. Rep. 144. Where a defendant, against whose estate a *fi. fa.* is sued out, dies after the judgment has been injoined, his lands are not subject to levy and sale under an execution issued after his death, upon the dissolution of the injunction. Abercrombie v. Hall, 6 Ala. Rep. 657. But the mere error in an execution, for which it is quashed, does not of itself set aside, a sale of land made under it; nor should the sale be set aside, if the purchaser without notice of the irregularity, has paid his money and obtained a deed. Chambers v. Stone & Pope, 9 Ala. Rep. 260.

The cases of Boyd, adm'r v. Dennis, and Jones, adm'r, v. Swift, *supra*, and several others in this court, which determine that the lien of a *fi. fa.* may be continued by an *alias* execution issued after the defendant's death, apply alone where the personal estate of the debtor is sought to be reached. See Lucas v. Doe ex dem. Price, 4 Ala. Rep. 679; Mansony & Hurtell v. The U. S. Bank, et al., Id. 735; Stewart v. Nuckals, at this term. These latter citations show that the rule has no application as it respects lands. See further, Hubbert and another v. McCollum, 6 Ala. Rep. 221; Smith & Bowdon v. Knight, 11 Ala. Rep. 618; Del Barco v. The Br. Bank at Mobile, 12 Ala. Rep. 238; Moore & Cocke v. Bell, 13 Ala. Rep. 459; McCollum v. Hubbert and Caple, Id. 282; Martin v. The Br. Bank at Decatur, at this term.

In the case at bar, the action was against Spencer Roane,

in favor of Walke & Clarke, for the use of William Kain & Co.; the judgment and original *fieri facias* thereon, pursue the writ and declaration in describing the parties. But the forthcoming bond is executed by Roane and Burke, without designating them as principal and surety. In the condition, the execution is described as having issued in favor of Walke and Clarke, taking no notice of the beneficial plaintiffs, and against Roane and Burke for the sum of $351. The amount required to be made by the *fi. fa.* is $328 18 debt, $21 85 damages, together with $6 56 1-4 costs of suit. Without stopping to inquire whether the discrepancy between the amount of the execution which issued, and that described in the bond, is fatal to the bond as a statute obligation, we are satisfied that the execution described in the condition, varies so materially from that which is part of the record, that the latter cannot be identified as the one on which the levy referred to in the condition, was made. Placing out of view the omission of the names of the beneficial plaintiffs, the insertion of the name of Burke as one of the defendants in execution, indicates that there must be another *fi. fa.*, which does not appear, or that that found in the transcript does not support the bond. In Lunsford et al. v. Richardson and O'Neal, and Moffitt & Watson v. The Br. Bank at Mobile, *supra*, the names of one or more of several of the defendants to the execution, were omitted in the description of it in the *fi. fa.*, and the omission was held a fatal variance. Here, the name of an individual who was not a party to the judgment and execution was inserted, which we think makes the misdescription more striking, than the mere omission of the name. In the former case, the description is not false, but imperfect; while in the latter, it is both false and imperfect.

A forthcoming bond, when taken in conformity to law, is to have the force and effect of a judgment, and an execution may issue on it; but to support an execution, it must be such as the statute requires. Upon such a bond, which will not authorize an execution to issue against the parties to it, an action is sometimes maintainable at the suit of the obligee. Whitsett v. Womack, 8 Ala. Rep. 466; Meredith v. Richardson & O'Neal, 10 Ala. Rep. 828. If however, the bond be so defective that the force and effect of a judgment cannot

be accorded to it, we cannot see how it can furnish the authority for an execution to issue. Where the bond is such as the statute contemplates, upon being returned forfeited, it becomes a *quasi* judgment for the purpose of sustaining an execution against the principal and surety; but if it want any of the essential characteristics, no such effect can be given to it. We have seen that the *fi. fa.* which was levied on the property of Roane, is not identified in the condition of the bond, but there, another execution between different parties is described. This being the case, there is wanting the basis on which to rest the bond as a statute obligation, and of course the execution as it respects Burke, was issued without a legal warrant. The bond then, so far as it concerns this case, must be treated as a nullity—as giving no authority to the clerk to direct the levy on, and sale of Burke's property; and the execution professedly founded upon it, is *merely void.* This conclusion seems to us to be the necessary consequence of the premises from which we have reasoned. There can be no middle ground at which we can stop, and say that the execution is voidable only. If an execution issues where there is no judgment, or one so entirely variant that by no allowable amendment, can it be shown that the execution was founded upon it, the proceedings under the execution cannot be supported. The present case is quite as strong to show the invalidity of the process—the bond, the *quasi* judgment is in itself so defective, as not to authorize an execution to issue; the *fi. fa.* then, under which the plaintiff in error claims, issued without the warrant of law, and could not have been executed. If this view be well founded, it seems to us, that there can be no pretence for sustaining the purchase of the plaintiff in error; but it must fall with the execution and bond, upon which it is dependent for its legal validity. We will not extend this opinion, by considering the other questions raised, as their decision becomes unnecessary. The judgment of the county court must be affirmed.

WHITE v. WOOD.

1. Where a contract for the sale of land, on which a part of the purchase money has been paid, is afterwards rescinded, by mutual consent, in the absence of any agreement to the contrary, the law implies a promise on the part of the vendor to refund to the vendee, the money thus received by him. An express promise to refund is not necessary.

Error to the Circuit Court of Marion. Before the Hon. S. Chapman.

Action of assumpsit, for money had and received, by plaintiff, against defendant in error. By the bill of exceptions, it appears, that Wood had sold to White a tract of land, at the price of $700, of which the latter paid $150 in cash. That the contract was subsequently rescinded by mutual consent; and that during a conversation on the subject of the rescission, between plaintiff, one Moss, acting as the agent of defendant, and Standifer, who had previously sold and conveyed the land to defendant, but the purchase money of which had not been paid by defendant to Standifer, Standifer remarked, that he ought to have $50 of the $150, that plaintiff had paid to defendant, and that then defendant would make a clear gain of $100, to which plaintiff assented. This conversation occurred before the rescission of the contract; defendant was not present at the time, and there was no evidence of the agency of Moss. It was proved, that at the time of the rescission, nothing was said about the $150.

The court charged the jury, that the plaintiff could not recover, unless they found from the evidence, that the defendant had promised the plaintiff, to repay the said sum of $150; and that there must be, either an express promise to pay, or facts from which they could infer a promise, or understanding to pay. To this charge the plaintiff excepted, and now assigns it as error.

EARNEST & WILCOX, for plaintiff in error.
No counsel for defendant.

CHILTON, J.—The plaintiff in error, having paid Wood $150, in part performance of his agreement to pay him $700, for the land, was entitled, upon their mutual agreement to rescind the contract, to have the amount paid, refunded him, unless he waived his right in some way in the negotiation. The proof shows, that when the contract was rescinded by the parties, nothing was said about the amount paid by the plaintiff to the defendant.

The rule is, that when contracts are rescinded, in the absence of a controlling agreement, the parties are to be restored to their former rights, and placed in the same situation they occupied before the agreement was made. Conner v. Henderson, 15 Mass. Rep. 319; Griffith v. Fred. Co. Bank, 6 Gill & Johns. 424; Pharr & Beck v. Batchelor, 3 Ala. R. 237; Griggs v. Woodruff et al., 14 Ala. Rep. 9. In the case before us, there was some proof adduced of previous conversation between the plaintiff, and the agent of the defendant, representing the $150 paid, from which the jury might infer, in the absence of countervailing proof, that the plaintiff consented to abandon his right to recover back the money he had paid; but this proof was for the jury to weigh, and the court could not give it such effect, as to require the plaintiff to prove a subsequent express contract to repay, on the part of the defendant.

If, as we have said, the parties, in rescinding the contract, made no agreement respecting the amount theretofore paid, in part performance of it by the plaintiff, the law implies a promise on the part of the defendant, to refund it. If however, the jury should come to the conclusion, that the previous negotiation between the agent of the defendant and the plaintiff, and Standifer, that the defendant should execute his note to Standifer for $50, and that he should retain the $100 as profits, entered into and formed part of the contract of rescission, then the plaintiff is not entitled to recover. This is clearly the law, as applicable to the case, and the charge of the court denying the plaintiff's right to recover, unless he had shown an express promise on the part of the

defendant to repay the $150, is in conflict with it. It was not incumbent on the plaintiff to prove an express promise to refund, by either positive or circumstantial testimony, as the charge assumes.

Let the judgment be reversed, and the cause be remanded.

LYON v. GOREE.

1. An officer in the execution of process, issued on a judgment in trover, which commands him to demand, and take from the possession of the defendant certain property therein specified, has no authority to take such property from the possession of a third person, and if he does so, can claim no protection under the process.
2. If an officer in the execution of process, goes beyond its mandate, and takes property from the possession of a stranger, he can only defend himself by shewing a better title in himself, or in him for whom he acts.

Error to the Circuit Court of Perry. Before the Hon. George Goldthwaite.

This was an action of detinue, by defendant against plaintiff in error, to recover a negro man by the name of Charles. At the trial, a bill of exceptions was sealed, by which the following facts are disclosed. After the defendant in error had introduced proof tending to show a purchase by him of the slave at a sheriff's sale, under execution, against one Townes et als.; and possession thereunder, and also property in said Townes, at the time of the levy and sale, &c., the plaintiff in error proved that he was the deputy marshall of the United States for the Middle District of Alabama, and as such took the slave by virtue of a writ of execution issued by the clerk of the District Court for said district, in favor of one Austin against James C. Harrell, by which execution he was directed to demand of, and take from the possession of James C. Harrell, the slave Charles, and if the said slave could not

be had, then he was further commanded to make the sum of eight hundred dollars, the value of the slave, from the goods and chattels, lands and tenements of the defendant, &c., as theretofore adjudged in an action of trover, brought in said court by said Austin, against said Harrell; and that in obedience to said writ he demanded the slave of Harrell, who informed him that he had given him up to the defendant in error, and had no more to do with him: that he then found the slave in possession of defendant in error, and took him under said writ. Other evidence was offered by defendant in error, conducing to show, that Harrell never had any property in the slave. The defendant below asked the court to charge the jury, that if they believed that he had the said writ of execution in his hands, and found the slave in possession of Goree, and took him into his custody under said writ, he is not liable, in this case, to the action of the plaintiff; which the court refused to give. Whereupon the defendant below excepted, and now assigns it as error.

Peck, for the plaintiff.

1. By the judgment in the district court, the plaintiff in that court, recovered the slave, if to be had, but if the slave could not be had, then the value assessed by the jury.

2. The execution issued on this judgment, commanded the marshall to demand of, and take from, the defendant in that case, in his district, the said slave, and have him before said court at the next term thereof, to be rendered to said plaintiff, &c.

3. This writ substantially commanded the marshall to take the said slave, if to be found in his district, and, when taken, he was, in contemplation of law, in the custody of the said court, by its officer, the marshall, that is, the slave was, in truth, in the custody of the law.

4. This being true, the defendant in this court, Goree, could not lawfully take the said slave out of the custody of the marshall, either by his own act, or by means of the process of a court of another and different jurisdiction; because, the slave could not be subject to two independent jurisdictions at the same time; for, the law will not authorize or per-

mit a conflict between different and independent jurisdictions. Hagan v. Lucas, 10 Peters' Rep. 400; Rives & Owen v. Welborne, 6 Ala. 45.

Graham and Garrott, for defendant.

The defendant relies upon the principle decided in 9 Ala. 162, and cases there referred to.

The process in the hands of the marshal did not authorize him to take the property of Goree.

Goree was not bound by the judgment upon which said process issued, being no party to that suit.

He could not enjoin in chancery, he could not compel the marshal to take a bond for the trial of the right of property; his only remedy was a suit against Lyon in trespass, trover or detinue.

DARGAN, J.—If an officer, in the execution of process, obeys strictly the mandate of the writ, he discharges his duty, and it would be intolerable, that he should be considered a trespasser, or made liable to others, for obeying the mandate of the law. Courts, therefore, uniformly protect their officers so long as they act within the line of their duty, but no further. When they assume to do what the process in their hands does not command, they act upon their own responsibility, and must be held responsible for their acts. Applying these general principles to the record before us, we can find no error.

The execution under which the plaintiff in error contends he was protected, directed him, to demand of and take from the possession of James Harrell, a certain negro man slave named Charles, of the value of eight hundred dollars; and if said slave could not be had, then of the goods and chattels, lands and tenements of the said James Harrell, he make said sum of eight hundred dollars, the value of said slave, &c. Having this process in his hands, he demanded of Harrell, the slave, but he could not be had, because he was not in his possession. The plaintiff afterwards found the slave in the possession of Goree, the defendant in error, and took possession of him, claiming to act under the authority of this writ.

If we were to hold that the defendant in error could not maintain this action, notwithstanding he may have a perfect title to the slave, we would hold that an officer should be protected, although he disregards the mandate of the law, and commits a trespass on others.

It is not denied by the plaintiff's counsel, that trespass, trover, or detinue, will lie against a sheriff, if he levy an execution issued against one, on the goods of another. But it is contended, that the execution, under which the marshall acted, is in the nature of process in *rem*, and gave him the right, and even made it his duty, to seize the slave, without regard to the title or right of him in whose possession he was found. This is not, in our opinion, the character of the process under which the marshall acted. It was an execution issued on a judgment, in detinue, in favor of the plaintiff in the execution, against Harrell, for the slave, or his alternate value. This judgment could not affect the right of one who was neither a party nor privy to it, and consequently, the execution issued upon it, could not impair the right of a stranger to the record.

The marshall not being commanded to take the slave from Goree's possession, he derived no authority from the writ to do it, and can claim no protection from it. He could therefore defend himself only, by showing a better title in himself, or in those for whom he acted.

Let the judgment be affirmed.

ABERCROMBIE v. BALDWIN ET ALS.

1. The possession of one tenant in common may become antagonistic, and exclusive, of a co-tenant, and will become so by an unequivocal, and notorious denial of the right of the co-tenant.
2. It is not indispensable to an adverse possession, that the title of the occupant be such as would be recognized. If it be colorable, and asserted

bona fide, it will be sufficient; and if he held adversely to his co-tenant, those claiming under him will also hold adversely.

Error to the Chancery Court of Macon. Before the Hon. D. G. Ligon.

THE bill in this case was filed by plaintiff in error, who claimed by deed from Nelson A. Crawford, one of the patentees, against Benjamin Baldwin, the other patentee, and some twenty sub-purchasers under him, for a partition of the land in controversy, which had been sold by the Indian reservee, to said Nelson A. Crawford and one Robert G. Hayden, the latter of whom assigned his interest to Baldwin, before the issuance of the patent. The defendants, in their answers, insist that they were *bona fide* purchasers without notice; that they held exclusive adverse possession of the land for many years, and so held at the time of the execution of the deed from Crawford to plaintiff, and that said deed is void by reason thereof. They also insist, that they have without notice, made valuable improvements on the land, &c. In respect to these matters of defence, the testimony of a witness, Bird Fitzpatrick, fully sustained the answers, but it was objected to on the ground of interest, he having once owned a part of the land, which he had sold to some of the defendants, as he stated in his deposition, under quit claim deeds, which were not produced on the hearing of the case. The remaining facts, if more are necessary for an understanding of the points involved, may be found in the opinion of the court. The decree of the chancellor, dismissing the bill, is now assigned as error.

COCKE, MCLESTER and RICE, for plaintiff in error.

1. This case is within the jurisdiction of a court of chancery. Deloney v. Walker, 9 Por. 498; Overton v. Woolfolk et als. 6 Dana, 374.

2. If the bill, on its face, is not obnoxious to a demurrer, the demurrers must be wholly disregarded—they can derive no aid from the answers. Story's Eq. Pl. § 647; 6 Paige, 570; 4 Young's Rep. 424.

3. The defendants have neither in their answers, nor by plea, sufficiently set up the defence of an adverse possession,

to avoid the deed under which the plaintiff claims.—1. An answer must disclose a defence, in terms sufficiently clear and unambiguous, to enable the complainant to understand the particular defence he has to meet; and a defendant cannot avail himself of any defence not stated in his answer, or use the matters stated, to sustain a different defence from that to which he himself has applied them. 2 Daniell's Ch. Pr. 814, 815; Catterlin v. Hardy, 10 Ala. 511; Strange v. Watson, 11 Ib. 324. 2. The requisites of a plea must be complied with, when the defence is incorporated in the answer. Snelgrove v. Snelgrove, 4 Desaus. 286. 3. In a plea in equity, there must be the same strictness as in a plea at law —not in form, but in substance. Story's Eq. Pl. § 658, and notes; 1 Bland. 280. 4. A plea should be direct and positive, and not state matters by way of argument, inference and conclusion. Hardman v. Elles, 5 Sim. 640; s. c., 2 My. & K. 732. 5. Tested by these principles, the answers do not sufficiently set up the defence.

4. Bird Fitzpatrick, the only witness by whom the defence is attempted to be sustained, is incompetent from interest, and his testimony must be excluded. The Bank of Norfolk v. Holman et als. 12 Ala. 369.

5. A possession, to be adverse, so as to avoid the deed of the claimant out of possession, must be—1. Under claim or color of title. Badger v. Lyon, 7 Ala. 564; Jackson v. Vermilyea, 6 Cow. 680; Rogers v. Hillhouse, 3 Conn. R. 403; Tasker v. Whittington, 1 Har. & McH. 151; Borrets v. Turner, 2 Hayw. 114; Ib. 336; Innis v. Miller, 10 Mart. 292. 2. Under a title, *prima facie* good in contemplation of law. Jackson, &c. v. Frost, 5 Cow. R. 346; Francoise v. De la Ronde, 8 Mart. 619; Bonne et al. v. Powers, 3 Mart. (N. S.) 458. 3. Under a *bona fide* claim of the entire title. Brown v. Lipscombe, 9 Por. 478; Hinton v. Nelmes, 13 Ala. 222; Livingston v. Penn. Ir. Co. 9 Wend. 511; Swartout v. Johnson, 5 Cow. 92; Innis v. Miller, *supra;* 1 Hayw. 180, 249, 320; 1 Burr. 224; 2 Vesey, sr. 156. 4. Under an independent and inconsistent title. Adams on Eject. 47; 2 Esp. 434; Co. Litt. 242, 296; 2 Story's Eq. § 1048, note 3; 2 Cruise's Dig. 337, § 62, 64; Ib. 357, § 14 to 21; Vaux, ex'r, v. Nesbitt, 1 McC. Ch. 352; Caruthers v. Dunning's

Les. 3 Serg. & R. 386; Ricard v. Williams, 7 Wheat. 107; 1 Marsh. 506; 2 Greenl. 242; Ib. 400; 5 Cow. 92; 12 East, 141; 1 Car. & P. 130; 6 Mart. 410; 12 Mass. 327; 9 Johns. 179; 10 Ib. 435; 13 Ib. 116; 20 Ib. 301; 5 Cow. 350; 3 Wend. 149; 4 Wheat. 213; 3 Des. 408; 3 Murp. 166. 5. And, as a necessary consequence, must amount to an actual disseisin, brought home to the knowledge of the disseisee. 2 Smith's Lead. Cas. 378, 379, 380; 383, note; 396, note; 465, 466; 6 Ala. 230; Brown v. Lipscombe, *supra;* Verdier v. Simmons, 2 McC. Ch. 385; Blue v. Sayre, 2 Dana, 213; Sessions v. Reynolds, 7 S. & M. 130; Pray v. Pierce, 7 Mass. 381; 9 Dana, 235; 3 Greenl. 188; 3 Johns. 492; 9 Wheat. 288; 7 Wend. 53; 12 East, 154, 155.

6. Submitted to these tests, the possession of Benjamin Baldwin, and those claiming under him, if it has been proven adverse at all, was never of such a character as to avoid the deed.—1. A possession by virtue of Haden's assignment, was not under even colorable title. 2. If it was, it was not under a title *prima facie* good. Herring v. McElderry, 5 Por. 161; Clarlitko v. Elliott, Ib. 403. 3. Nor under a *bona fide* claim of the entire title: both the assignment on its face, and the testimony of Abbott, repel such an idea. 4. The title was in the government, until the approval of the contract on the 27th December, 1839, and no possession could have been adverse to it. Wright v. Swan, 6 Port. 84. 5. On the approval of the contract, that which before was a mere naked possession, became fiduciary—similar in its incidents to that of lessor and lessee, trustee and *cestui que trust*, and the same principles applied. Willson v. Watkins, 3 Peters, 51; Vaux v. Nesbitt, 1 McC. Ch. 352, 60. 6. To such a relation, the law of *champerty* and *maintenance* does not apply. 2 Story, § 1050, and note; 3 Cow. 624. At all events, without an actual disclaimer, and notice brought home to the co-tenant. See authorities cited under last clause of 5; Clymer v. Dawkins, 3 How. U. S. 674; Cloud v. Webb, 4 Dev. 290. 7. Those claiming under Benjamin Baldwin, stand in no better situation than he does. Their deeds are void. Jeffers v. Radcliffe, 10 N. Hamp. 242; Duncan v. Sylvester, 11 Shep. 482; Blossom v. Brightman, 21 Pick. 285; Peabody v. Minot, 24 Ib. 329; Mitchell v. Hazen, 4 Conn. 495; Griswold

v. Johnson, 5 Conn. 363; Jewett v. Stockton, 3 Yerg. 402. If not void, they confer no higher right. Hurd v. Cushing, 7 Pick. 169; Jackson v. Davis, 5 Cow. 123; Jackson v. Harbin, 7 Ib. 323; 1 Caines, 394; 3 Johns. 499; 4 Ib. 230; Rowletts v. Daniell, 4 Munf. 473. They are chargeable with notice of Crawford's interest, and are not *bona fide* purchasers of the entire title. Harris v. Carter, 3 Stew. 233; Graves v. Graves, 1 A. K. Marsh. 165; Thompson v. Blair, 3 Murp. 583; Chew v. Calvert, Walker's R. 54; Biscoe v. E. Banberry, 1 Chan. Cas. 287; Moore v. Bennett, 2 Ib. 246; 3 Atk. 134; Amb. 313; 2 Vent. 384; 5 Cow. 346.

7. Not being *bona fide* purchasers, they are not entitled to compensation for improvements—at least beyond the value of the rents and profits. Gillespie v. Moon, 5 Johns. Ch. 585; 8 Wheat. 1; 6 Paige, 40, 390; 1 J. J. Marsh. 404; 7 Ib. 141; 7 Dana, 177; 2 Sugden, 305, top.

J. E. Belser, G. W. Gunn and McLester, contra.

1. The complainants should have established their case at law, before they applied for partition in a court of equity, under the circumstances. Phelps v. Green et al. 3 John. Ch. 302; Cart v. Pultney, 2 Atkins, 380; Bigelow v. Jones, 10 Pick. 161; Wilkins v. Wilkins, 1 Johns. C. 111.

2. The defendants claim not only through Hayden's bond, for titles for the whole land executed to Baldwin and Fitzpatrick, but also in many of the cases through warranty deeds from others. This, without notice, constitutes their possession adverse, and such purchasers will be protected. Bogardus v. The Church, 4 Paige, 178; Jackson v. Smith, 13 Johns. 406; 13 Lev. & Rawle, 356; Dexter et al. v. Nelson, 6 Ala. 68.

3. Bill for partition will not lie when defendants are in possession, and where they claim adversely in connection with their possession. Martin et al. v. Smith et al., Harp. Eq. 106; Benner v. Kennebec, 7 Mass. 475; Stew. heirs v. Coalter, 4 Rand. 74; Wilkins v. Wilkins, 1 Johns. Ch. 111; Martin v. Smith, 1 Har. Eq. 106.

4. If the defendants were in possession at the time of Abercrombie's purchase, he is a trustee for them, and his legal title will not avail him. Possession in a vendee operates as

a notice to every one, although the opposite party may be remote from the land. Scroggins v. McDougald et al. 8 Ala. 385; Nelson v. Mason, 1 Cranch, 100; Smith v. Zurcher, 9 Ala. 208; Horton v. Smith, 8 Ala. 78; Fenno v. Sayre, 3 Ala. 458.

5. If one stands by, and sees improvements put on land which he has a legal title to, he shall not be permitted to recover them, or for their value. Wendell v. Van Rensselaer, 1 Johns. Ch. R. 344; Bugert v. Boyd, 1 Story's Rep. 478; Towns v. Needham, 3 Paige, 546.

6. Purchasers for a valuable consideration without notice, and tenants in common, are entitled to pay for their improvements, in a court of equity. Bugert v. Boyd, 1 Story's Rep. 478; same v. same, 2 Ib. 605; Towns v. Needham, 3 Paige, 545; 1 Story's Eq. Jur. 672, 675.

COLLIER, C. J.—The court of chancery dismissed the bill in this cause, upon the ground that the defendants, or those under whom they claim, were in possession of the land in controversy, with "color of title," asserting *bona fide* an exclusive right, at the time the deed was executed by Crawford to the complainant; and if the decree is defensible upon this ground, we need not look further into the case.

R. G. Hayden and Nelson Crawford, are described in the patent as having purchased of the Indian reservee—holding his deed, regularly approved; Benjamin Baldwin is duly declared to be the assignee of Hayden; and the patent conveys the title of the United States to the assignee and Crawford, "and to their heirs and assigns forever." The effect of the patent, at least in this State, was to convey a joint estate, which the grantees were to hold as tenants in common. Clay's Dig. 169, § 6. Upon this hypothesis, we are to inquire whether one tenant in common can oust his co-tenant, and exclude him by any act of his own, so as to hold adversely.

It is well settled, that one tenant in common may maintain ejectment, or a similar action, against his co-tenant, if there has been an *actual ouster*. Barnitz v. Casey, 7 Cranch's Rep. 456; Chiles v. Conley, 9 Dana's Rep. 385; Carpenter v. Thayer, 15 Verm. Rep. 552; Taylor v. Hill, 10 Leigh's

Rep. 457. A tenant in common, from the nature of the estate, must, if in the enjoyment of his rights, be in the possession of the whole; consequently, the seizin of one such tenant, who admits, or does not deny, the title of his co-tenants may be considered the seizin of all. Knox v. Silloway, 1 Fairf. Rep. 201; Shumway v. Holbrook, 1 Pick. R. 114; Barnard v. Pope, 14 Mass. Rep. 434; Poage v. Chinn, 4 Dana's Rep. 50. One tenant in common may oust his co-tenant. Hoffstetter v. Blattner, 8 Miss. Rep. 276; Mason v. Finch, 1 Scam. Rep. 495. But whether such tenant entered upon the estate, claiming an exclusive right, and ousted his co-tenant, is a question of fact. Blackmore v. Gregg, 2 Watts & Serg. Rep. 182.

In Law v. Patterson, 1 Watts & Serg. Rep. 184, it was decided that an entry upon, and possession of, the whole of the land by one tenant in common, as if it had been his exclusive property, and the receipt of the rents and profits thereof, without accounting to his co-tenant for any part thereof, or proof of a demand to do so, amounts to an actual ouster. So, an ouster will be presumed between tenants in common, in favor of one who has had peaceable possession, and received the profits for the length of time which the statute of limitations prescribes as a bar. Mehaffy v. Dobbs, 9 Watts's Rep. 363. And a tenant in common who refuses to pay rent, when demanded by his co-tenant, and claims the whole of the land, will be considered as an adverse occupant. Phillips v. Gregg, 10 Watts's Rep. 158.

A co-tenant may be ousted, by denying or resisting his right, or by excluding him from the enjoyment of the property. Bracket v. Norcross, 1 Greenl. Rep. 89; Thomas v. Pickering, 1 Shep. Rep. 337. If the tenant who is out of possession, submits to the exclusive occupancy of his co-tenant, commenced with the intent to hold in severalty, until the expiration of the period prescribed by the statute of limitations, as a bar to an action, he cannot recover. Gillaspie v. Osborn, 3 A. K. Marsh. Rep. 77. Although possession by one tenant in common, will not *per se*, constitute an adverse possession against his co-tenants; but if, by a notorious act, he claims an exclusive right, even under a void title, his pos-

session becomes adverse, and the statute of limitations will run. Jackson v. Tibbitts, 9 Cow. Rep. 241; Clapp v. Bromagham, Id. 530. A silent possession, accompanied by no act which can amount to an ouster, or give notice to his co-tenant of his intention to exclude him, will not make a possession adverse. McClung v. Ross, 5 Wheat. Rep. 116. In Willison v. Watkins, 3 Pet. Rep. 51, it was said that the relation between tenants in common, is in principle very similar to that between lessor and lessee—the possession of the one, is the possession of the other. But, if one ousts the other, or denies his tenure, his possession becomes adverse. See Weld v. Oliver, 21 Pick. Rep. 559; Booth v. Adams, 11 Verm. Rep. 156; Rains v. McNairy, 4 Hump. Rep. 356; Bullard v. Copps, 2 Hump. Rep. 409; Tillotson v. Doe, 5 Ala. Rep. 407.

It may be conceded, that the ouster of one tenant in common by his co-tenant, though it create an adverse possession, will not take from the party ejected the right of entry, so as to entitle him to maintain an ejectment, or other similar action. Midford v. Harbison, 3 Murp. Rep. 164. So, a deed by which one tenant assumes to convey the joint estate, will be void as against his co-tenant; but if the grantee go into possession under the deed, and claim an exclusive interest in the property, his possession will be adverse. Jewett v. Stockton, 3 Yerg. Rep. 492; Thomas v. Pickering, 1 Shep. Rep. 337; Duncan v. Sylvester, 11 Shep. Rep. 482; Jeffers v. Radcliffe, 10 N. Hamp. Rep. 242; Burton v. Murphy, 2 Taylor's Rep. 259; Blossom v. Brightman, 21 Pick. R. 285; Nichols v. Smith, 22 Ib. 316; Bartlet v. Harlow, 12 Mass. Rep. 348; Rising v. Stannard, 17 Mass. Rep. 282; Bigelow v. Jones, 10 Pick. Rep. 161.

This hurried view of the law, is quite sufficient to show, that the possession of one tenant in common may become antagonistic, and exclusive, and the facts abundantly show an unequivocal and notorious denial of the right of Crawford, the co-tenant, in the present case. Hayden, himself, claimed to be the sole owner of the entire half section—insisting, that he held a written relinquishment of Crawford's interest. Baldwin purchased, without any knowledge, that any one else joined with Hayden in the purchase from the reservee,

and when informed of it, was assured that his vendor had become the exclusive proprietor. Though the patent issued in the joint names of Baldwin and Crawford, the former occupied the whole tract, sold parts of it to different persons, and other portions of it were sold under executions against his estate. All the persons who claim through Baldwin, have ever since their purchases, been under the impression that their titles were good, and the most of them have erected buildings, or made other valuable improvements. Here, then, is an open and notorious repudiation of Crawford's title by Baldwin and his co-defendants, by acts the most significant—taking possession, selling and improving. If a knowledge by Crawford that he was ousted, was essential to make the occupancy of the persons in possession, adverse at the time he relinquished his right to the complainant, it will be inferred, that he was informed of it; especially as it does not appear that he resided in the State, from the time of the purchase of Hayden and himself, until he made the deed to the complainant.

Those who claim through Baldwin, must be considered as holding adversely, if such was the character of his possession, conceding that he could not, by any conveyance known to the law, divest the title of his co-tenant. It is not indispensable to an adverse possession, that the title of the occupant be such as would be recognized. If it be colorable, and asserted *bona fide*, this, it would seem, is sufficient. A conveyance of land by one against whom it was held adversely under a claim of title, is void. Gibson v. Shearer, 1 Murph. Rep. 114; Martin v. Pace, 6 Blackf. Rep. 99; Bledsoe v. Doe, 4 How. Rep. (Miss.) 13. Such a sale, it is said, is void for all purposes—not only as against the adverse possession or title, but as between the parties themselves. Williams v. Hogan, Meigs's Rep. 187. It has been held, that if a party was in the adverse possession of part of a tract of land, when it was sold by another person to a third, by legal construction, the possession will be considered adverse to the whole tract. Mitchell v. Churchman, 4 Hump. Rep. 218.

The question of what constitutes an adverse possesion, and the effect of it upon a conveyance made by a person who claims under a superior title, to some third party, has frequent-

ly come before this court. Our decisions, as well as those by other courts, are cited, and to some extent reviewed in Hinton v. Nelms, 13 Ala. Rep. 222; it is there said, that to avoid a sale upon such a ground, it must appear there was a person in the actual possession, asserting openly and *bona fide* a claim of title, which is hostile and independent of that attempted to be conveyed. If the proofs are to be received as true, the elements of this defence are abundantly established. See also, Dexter & Allen v. Nelson, 6 Ala. Rep. 68.

Wright v. Swan, 6 Port. Rep. 84, is unlike the present. There the defendant went into possession of a tract of land, while it was the property of the United States; it was entered by a person who sold and conveyed it to the plaintiff, and the defendant, without any other pretence of title than his actual possession, insisted that he was an adverse possessor of the land, and the deed under which the plaintiff claimed, was void. This court said, there can be no entry which will create a title adverse to the government; and to constitute an adverse possession, it should be under color of title. It is not essential that the title shall be good—its validity is not the question to be examined. To hold, under the facts of the case, that the defendant is authorized to make such a defence against one claiming mediately or immediately from the United States, would overturn well established principles. If by color of title, was meant documentary proof of it, though invalid, we think it was rather too restrictive; but we incline to the opinion, that color of title was used as the synonyme of a *bona fide* claim of title. In the case at bar, both Crawford and Baldwin were in possession previous to the issuing of the patent, under evidences of title which gave them a right to occupy—the patent continued and perfected their title as tenants in common. They both claim under the certified deed of the Indian reservee and the patent, and do not deny their validity. But Baldwin, and those who deduce a title through him, insist that Crawford divested himself of the title previous to the issuing of the patent, by some act in favor of Hayden, who assigned all his interest to Baldwin. Viewed then as it may be, the case is nothing more than the ordinary one, of a tenant in common ousting his cotenant, by setting up an exclusive title.

In respect to the deposition of Fitzpatrick, by which the answer of Baldwin is supported to the full extent, it seems to us that it cannot be rejected. It does not appear that the witness was interested in the result of the suit, or that the defendant Baldwin has exhibited a bill for discovery against the complainant; the questions proposed are not leading, nor do they call for the disclosure of irrelevant facts; certainly not to the extent to which, according to the view taken of the case, it is necessary to avail ourselves of the testimony.

This view is decisive of the case, as presented, and relieves us from the necessity of considering the other questions discussed at the bar. The consequence is, the decree is affirmed.

MACHEN, Ex'r v. MACHEN.

1. A will by which two slaves were given to J. M. a married woman, "during her life, then to her bodily heirs. If there should be no heirs for said negroes and increase to go back to the heirs, and an equal division made amongst the heirs"—uncontrolled by any other clause in the will, showing that by the term *bodily heirs*, the testator meant *children*, vests the absolute estate in the first taker.
2. The slaves having been delivered to the legatee, by the executor of the testator, the entire property vested in the husband, and the repeated declarations of the husband, that the slaves belonged to the wife, will not vest the title in the wife, or prevent the executor of the husband, after his death, from recovering the slaves.

Error to the Circuit Court of Cherokee. Before the Hon. Thomas A. Walker.

Detinue for five slaves, instituted by plaintiff, as executor of William Machen, deceased, against the defendant in error, who was the widow of the testator. The plaintiff proved the possession of the slaves by his testator for several years before and at the time of his death. The defendant intro-

duced in evidence the will of Merry Hall, her father, made in South-Carolina after her intermarriage with plaintiff's testator, which contains the following clause: "I leave to Jane Machen two negroes, Tamer and Prince, during her life, then to her bodily heirs: If there should be no heirs, for said negroes and increase to go back to the heirs." Tamer and Prince are two of the negroes sued for, and the remainder are their increase. After the death of defendant's father, the plaintiff's testator went to South-Carolina, and there the executor of her father delivered them to her, and they brought them to Alabama. There was proof of various declarations of the testator at different times between the date of the delivery of the slaves by the executor to defendant, and the date of the death of the testator, conducing to show that he admitted and recognized the negroes as belonging to defendant and not to him. A number of charges were asked, some of which were given, and some refused; all of which however presented the question, whether, on the above state of facts, if believed, the plaintiff could recover. The charges of the court were, substantially, that if the jury believed the above facts to be proven, they should find for defendant.

The plaintiff excepted to the charges of the court, and now assigns them as error.

Woodward, for plaintiff in error.

Merry Hall's will creates a limitation, which the law will not allow to take effect, but vests the absolute estate in the first taker. 5 Ala. 578; 4 Kent, 213; 6 Ala. 363.

The first charge is wrong, because it would allow the will or wish of James Machen to control the law, and make the limitation in the will valid, which the law pronounces void. If however, the charge means simply that James Machen could waive his rights by mere acquiescence in the will, although the property came to his possession, it is equally erroneous. Gamble v. Gamble, 11 Ala. 966.

The case of Puryear v. Puryear, 12 Ala. 14, does not conflict with the view taken by plaintiff in error; nor does it sustain the defence, because the property claimed by the wife in that case, was in the nature of paraphernal property, which by the common law, she could retain in spite of her husband,

after his decease, and probably against his creditors. 2 Bacon, 21; 3 P. Wms. 337: 2 Atkyns, 78; and if given by a stranger, can be held against husband. 2 Story's Eq. § 1377. The property sued for is not, and could not partake of the nature of paraphernalia, 2 Story's Eq. § 1375 '76. But if a husband can by mere permission, divest himself of title, or prevent title from vesting, then the title of the wife had its origin in his volition; and if he did not know his rights, he could not exercise his will. To deny himself of them thus, therefore, is different from the cases which are controlled by mistake of law. But an admission of a part, under a misapprehension of his legal right, will not affect him, unless by those admissions, the interest of third persons have become involved. 4 Wend. 292; 4 Mass. 342; 7 Id. 452, 488; 2 Story's Eq. 1375; 2 Phil. Ev. C. & H's notes, 211, 212; 11 Ala. 964.

The exclusion of the testimony of counter declarations, was error, because the husband was at any time at liberty to assert his rights, and if the plaintiff could show he did so, he should have been permitted by the court. 12 Ala. 14.

L. E. Parsons and J. B. Martin, contra.

CHILTON, J.—1. The rule in Shelly's case, which this court, and most of the courts recognizing the principles of the common law, have adopted, is, that "where the ancestor, by any gift or conveyance, takes an estate of freehold, and in the same gift or conveyance, an estate is limited, either mediately or immediately to his heirs in fee or in tail, the terms *heirs* are words of limitation, and not words of purchase." 1 Rep. 93; 5 Ala. Rep. 580.

Applying this rule of construction to the case at bar, we think there can be no doubt but that the limitation over, after a life estate in the defendant, "*to her bodily heirs*, and if no heirs, then to the heirs of the donor," cannot be supported. Had land been the subject of the devise, the language would clearly have created an estate-tail, and as such estate cannot be created in personal property, the first taker has the absolute estate. There is nothing in the will of Merry Hall, so far as we are informed by the bill of exceptions, to show

that the terms "bodily heirs" were used as synonymous with children, and in the absence of any thing contained in the will, thus restricting the meaning of the term, we must construe it in its general legal and technical sense, as indicating the general line of heirs of the first taker. See Darden's adm'r v. Burns' adm'r, 6 Ala. Rep. 362, and the authorities there referred to ; Polk, et al. v. Farris, 9 Yerg. Rep. 242 ; Duncan and wife v. Martin, Hall, et al. 7 ib. 519, 525.

2. It appears that while the property was upon the premises of the testator, he admitted, by repeated declarations, that it belonged to his wife, the defendant ; that it had been willed to her ; and that he had no claim to it.

It is insisted, in the argument, that the will, having vested the estate absolutely in the wife, and consequently in the husband, by reason of their legal identity, he could not divest his title, or repudiate it, by such declarations, but that being possessed of the slaves, his marital rights attached, and his executor has the right to assert his title, notwithstanding his repudiation of all claim to the property.

By the marriage, the husband became entitled to all the wife's chattels in possession. Her legal existence is merged in that of her husband, and the delivery of the property to her by the executor of Merry Hall, was a delivery to the husband. His marital rights then attached and became complete. In such case, says Mr. Clancy, 2, 3, "he takes it free from any right of survivorship in the wife ; he may dispose of it in any way during his life, or bequeath it at his death, and if he make no such disposition of it, his personal representatives, and not his wife, though she should survive him, shall have it."

In respect to the rights of the wife, arising from contracts either express or implied, and which must be reduced to possession by action at law, or, as such rights are usually called, the wife's *choses in action*, the husband's right is more restricted. If he die without having reduced them into possession, the wife takes them by survivorship. Clancy's Rights, &c., 4.

These are elementary and well established principles of the law, and in their application to the points presented by the record before us, clearly establish that the absolute right to

the slaves had vested in the husband, and unless the wife is entitled to hold them by reason of the husband's declarations, the plaintiff, as executor of the husband, is entitled to recover. There was no trust created by the will. The gift to the wife, at least for her life was absolute, (and we have attempted to show that it vested the entire property,) and if the property, having been delivered to the wife, did not, *eo instanti*, vest in the husband, in whom did it vest? The executor had parted with the title and possession, and both having vested in the wife absolutely, the husband's title could not have been otherwise than complete.

When personal property is bequeathed to a married woman, it only requires the assent of the executor to vest the title absolutely in the husband. It is not necessary that it should be reduced to actual possession. In Pitts v. Curtis, 4 Ala. Rep. 350, the father, by his will, gave the slave to his son, until the slave arrived at the age of twenty-one years, and the remainder of the life of the slave, to his daughter, then a married woman. The slave was delivered by the executor to the son. Held, that the husband took the remainder, notwithstanding the death of the wife before the termination of the son's estate. So, where the slave was in possession of the wife's guardian, the title vests absolutely in the husband, although the guardian retain the slave. McGehee v. Toland, 8 Por. 36. So, where the slave was hired as the property of a *feme sole*, and she married, and husband died before the expiration of the hiring, held, the absolute property vested in the husband's representative. 1 Dev. 310, 456; 4 ib. 512.

The title having vested in the husband, no contract which he might afterwards have entered into *directly* with the wife, and much less, any declaration he may have made during the coverture, could, at law, vest the property in the wife, so as to enable her to resist, successfully, the action of the husband's representative. See Gamble v. Gamble, 11 Ala. Rep. 966, and the cases there cited.

This view is conclusive of the case in this court, and the circuit court having ruled the law differently, the judgment is reversed, and the cause remanded.

This case is clearly distinguishable from the cases cited, where the husband has never taken possession of a legacy or distributive share of the wife *quoad* husband, but holds as executor, administrator, &c., or as trustee for the wife. It is also unlike the case of Tripp, ex'r v. John, adm'r, at last term, in which the husband received and held the property in subordination to an anti-nuptial agreement entered into between himself and wife.

ORR v. BURWELL.

1. Where O sells to B a circular saw, with the understanding, that if B is compelled to pay, for the patent right to use it, such payment shall be borne by O: and the agent of one, who claims to be the patentee of the saw, demands of B the price of the patent right, which B voluntarily pays, it is a good defence, in a suit by O against B, for the purchase money of the saw, if B proves that the patent to which he yielded, covered the saw.
2. Whether, or not, a particular saw is embraced by a patent, is a question of fact, not of law, and the determination of it, is properly referred to the jury.

Error to the County Court of Marengo. Before Hon. J. A. Young, Judge.

This was an action of assumpsit, instituted by plaintiff against the defendant in error, on a note given by him to plaintiff, in part payment for a circular saw. The note was for $100, and was given with the understanding, that if the defendant was legally bound, and forced to pay for a patent right to use said saw, he should have the benefit of such payment against the plaintiff, but the payment was not to be voluntary. An exemplification of a patent was produced by defendant, by which the exclusive right was secured to one Robert S. Thomas, to make and construct a "rotary saw," which was described, and the defendant introduced evidence tending to show, that the saw he had purchased from the

plaintiff, was covered by this patent. He also proved, that after the purchase from the plaintiff, he was called upon by the agent of the patentee, who claimed from him $100, the price of the right to use the saw embraced in the patent, which defendant paid without suit.

The court charged the jury, that the defendant was not bound to permit himself to be sued, to test the patent right, but might pay the price of the patent, without it, and that if the patent produced, covered the saw used by him, the plaintiff could not recover.

The plaintiff requested the court to charge the jury, that the patent produced and relied on by the defendant, did not embrace the saw sold them by the plaintiff, which charge the court refused to give, but charged the jury, that it was for them to determine, from the evidence, whether the saw was embraced by the patent, or not. To the charges given, and to the refusal to charge as asked, the plaintiff excepted, and now assigns them as error.

John, for plaintiff in error.

1. The proper interpretation of the contract between the plaintiff and defendant, is, that Orr let the Burwells have a circular saw at much less than its cash value, in consideration that they would litigate the claim to a patent right to use the saw. If they succeeded in the suit, they were to pay their own expenses, and to pay Orr the amount of the note, and interest. If they failed, Orr was to pay, or allow them the price of the patent, and their expenses. If Orr had litigated the claim to a patent, he would have sold the saw for a full price. To allow the Burwells to purchase at a reduced price, with notice of the probability of litigation, and then, without a proper contestation of the claim, pay the price claimed, and by that means, get the saw for less than its value, would be clearly wrong. Such a result certainly never was contemplated by the parties in making the contract.

2. This contract is similar in its legal effect to a covenant for quiet enjoyment, (the court below viewed it as such,) and if so, something equivalent to a legal eviction, was necessary to authorize the defence insisted upon. Salle v. Light's ex'r, use, &c. 4 Ala. 700; Waldron v. McCarty, 3

Johns. 464; Van Slyck v. Kimball, 8 Ib. 198; Whitbeck v. Cook and wife, 15 Ib. 483.

3. It was not competent for the defendants to dispute the plaintiff's right to recover, unless they had been charged at the suit of the patentee, or his assignee, who by such suit established a patent, covering the right to use the saw sold by the plaintiff to defendants. Vibbard v. John, 19 John. 77; Livingston v. Bain, 10 Wend. 384. Because such a suit was in fact a part consideration for the saw, part of the express understanding.

4. This agreement is not in the nature of a covenant of warranty, and therefore the case of Dupuy v. Roebuck is not applicable, nor the cases of that class; because Orr had an unquestionable title to the saw, but might not have the right to use it in a particular manner. This agreement was certainly not intended to cover his title to the saw; consequently, the agreement is in its effect similar to a covenant for quiet enjoyment. For these reasons, it is contended that the first charge given is incorrect.

5. It is the province, and when requested, as in this case, the duty, of the court, to expound to the jury all written instruments which may be given in evidence. Martin v. Chapman, 6 Por. 344, 351; 1 Ala. 607; 7 Ib. 322.

6. The construction of the specifications of a patent belongs to the court, and not to the jury; therefore, the court erred in referring the patent and specifications to the jury, to ascertain whether the saw in controversy was covered by the patent. Neilson et al. v. Harford et al. M. & W. 805, 821.

W. E. Clark, contra.

Under the agreement between the parties, if the saw was within the description of the saw patented to Poelnitz, then the defendant was entitled to the amount paid Poelnitz for a violation of his patent, as a set off against the note sued upon in this action, and Burwell was not bound to litigate the matter with Poelnitz, in order to determine the fact of identity, but was authorized to pay the same without suit, if he in good faith paid it on the patent of Poelnitz. Dupuy v. Roebuck, 7 Ala. 484.

The court properly submitted the whole matter to the ju-

ry, and was not bound to decide upon patents. It is the duty of the court to construe written instruments, but not to compare, and decide upon the identity of inventions described in the agreement and proof in the patent. Smith v. Pearce and Pearce, 2 McLean's R. 176.

DARGAN, J.—The agreement between the plaintiff, and defendant, as described by plaintiff in his answer to the interrogatories, was, that if the defendant was legally compelled, and forced, to pay for the patent right of the saw, that such payment should be a charge against the plaintiff. Under this contract, the defendant yielded to the right of the patentee, without suit, and paid him $100, and now insists on this payment, as an offset to the note given to the plaintiff for the saw. Did the court err in the charge, that the defendant was not bound to permit himself to be sued, but might pay the patentee, and insist on this payment as a defence to the note, if the defendant showed that the patentee was entitled to it?

If one purchase land of another, with warranty, and without suit yields to a paramount title, he may sue on the covenant, and if he show that the title to which he yielded, is paramount to the title of his vendor, he may recover. Dupuy v. Roebuck, 7 Ala. 485; 2 Greenl. Ev. 202; Hamilton v. Cutts, 4 Mass. 349; Tuft v. Adams, 8 Pick. 547; 5 Conn. 497; 9 Wend. 416. The vendee, however, assumes the burthen of proving, that the title to which he yielded is paramount to the title of the vendor, and thus, in the action of covenant, the right of his vendor, and the right of him to whom the vendee yielded, will be tried. We think the contract in this case, resembles, in this respect, a covenant of warranty; and that the defendant, upon demand, might yield to the right of the patentee, and pay the sum to which his right entitled him, without suit. The language of the contract is, that if the defendant was legally compelled to pay, that then the payment should be borne by the plaintiff.

In this case, the burthen of proof lay on the defendant, to show the right to which he yielded, entitled the patentee to recover; and it is therefore as effectually tried in this suit, as it would have been, had he permitted himself to be sued.

But it is contended, that by the express terms of the contract, the defendant stipulated to litigate with the patentee, his right to demand payment for using the saw. We do not think the contract is to be thus interpreted. It is true, if such a stipulation, in express terms, was embraced in the contract, and if the defendant had undertaken expressly to submit to a law-suit, and to litigate the right of the patentee with him, before he could claim of the plaintiff the amount due the patentee, he then must have shown, that such litigation had been commenced, and determined against him. But we cannot infer from the contract, as proved, that the defendant did agree, to litigate in law, the right of the patentee; but we think, by a fair interpretation of it, that the contract resembles a covenant of warranty, and that the defendant might yield to the demand of the patentee, without suit, if satisfied that he was entitled to recover.

2. Nor is there any error in the charge of the court, that the jury should determine from the evidence, whether the patent produced, embraced the saw, or not. It is the duty of the court to construe all written instruments, but the application of them to the subject matter to which they relate, is always a matter of fact: that is, if a deed is introduced as evidence, the nature, quality, or quantity, of the estate conveyed by it, is a matter of law, and must be determined by the court; but the identity of the land conveyed, or whether the land in controversy, is covered by the deed, is a matter of fact, to be tried by the jury. In this case, it was the duty of the court to construe the patent, if any question of construction had arisen; but whether the saw purchased by the defendant, from the plaintiff, was one of *the description* embraced by the patent, and which gave the patentee the right to demand the sum for its being used by the defendant, depended on the evidence, and was a question of fact, to be determined by the jury.

There is no error in the judgment, or in the ruling of the court, and the judgment is consequently affirmed.

CAMERON v. THE STATE.

1. The offence of gaming is complete by playing *once*, and does not require a repetition of it.
2. It is not error to charge the jury, "that if they believed, from the testimony, that the defendant played cards at the house mentioned by the witness, and that it was, at the time, a house to which people did resort, then the defendant was guilty."

Error to the Circuit Court of Pickens. Before the Hon. S. Chapman.

This was an indictment against the plaintiff in error, for card playing. By a bill of exceptions taken in the case, it appears, that the State proved by a witness, that the defendant played at a game of cards, with others, in an unoccupied house in the town of Vienna, in said county, at least *once*, in the presence of the witness, and that persons did resort to said house, for the purpose of play.

The defendant's counsel thereupon asked the court to charge the jury, that playing *once* would not constitute the offence, charged in the indictment; which charge the court refused to give, but charged the jury, that the statute prohibits playing at an out-house where people resort: that if they believed from the testimony, that defendant played cards at the house, mentioned by the witness, and that it was, at the time, a house to which people did resort, then the defendant was guilty.

To the refusal to charge as asked, and to the charge given, the defendant excepted, and now assigns the same as error.

Clitherall, for plaintiff in error.

Attorney General, contra.

1. The charge refused was correctly refused, for playing *once* "in an out-house where people resort," is as much a violation of the law, as if the defendant had played at such a place fifty times.

2. The charge given, was both within the letter, and policy of the law. Any house, not occupied, where people resort for the purpose of playing cards, is an out-house, within the meaning of the act. State v. Faulkner, 2 McCord, 438; Wilson v. Com. 9 Leigh, 648; State v. Currier, 10 Shipley Rep. 43.

COLLIER, C. J.—The bill of exceptions, perhaps, does not raise the question as explicitly as it might have done, whether the house where the gaming is alledged to have taken place, was an "out-house where people resort," within the meaning of the statute on which the indictment is founded?

The prayer for instructions is, "that a playing once, would not constitute the offence, as charged in the indictment." This instruction was properly refused; for the offence is complete by playing "at a game with cards," at the place designated, (Clay's Dig. 432, § 8;) and to hold a repetition of the playing to be essential to constitute the offence, would be an interpolation of the statute, which no court is authorized to make.

In respect to the charge given, it affirms "that the statute prohibits playing at an out-house where people resort, that if they (the jury) believed, from the testimony, that the defendant played cards at the house mentioned by the witness, and that it was at the time, a house to which people did resort, then the defendant was guilty." This charge is unexceptionable in point of law, and refers to the jury the ascertainment of the facts. The fact, that the house where the playing took place, was detached from others, and inclosed by a fence, does not show that it was not such as the statute alledges. To make it an "out-house," within the contemplation of the legislature, it was not necessary that it should be in the same inclosure with a mansion house, or other building in which persons reside. However far removed from these, if it is a house to which *people resort*, it is sufficient to entitle it to the designation used by the indictment. The evil example of public gaming is what the statute (as indicated by its terms) intended to suppress, and it was designed to reach all places where "cards or dice" are the de-

vices with which persons play under circumstances of publicity, or where persons may, and do resort at pleasure. If this charge was inexplicit, and the plaintiff had desired a more special instruction as to the house being a place of resort, to satisfy the requisition of the law, he should have prayed it.

We have but to add, that the judgment of the circuit court is affirmed.

FULFORD v. JOHNSON, HENDON & CO.

1. An irregular indorsement on paper, not negotiable, is not embraced by the act of 1828, and the liability thereby created is, that the indorser will pay it, if, by the use of proper diligence, the money cannot be collected from the maker.
2. The question of diligence, in the case of an irregular indorsement of non-negotiable paper, is for the jury; but to constitute such diligence as will bind the indorser, the maker must be sued to the first court after the maturity of the paper, unless it is dispensed with by the insolvency of the maker, or some such valid reason.
3. When the note of a third person is assigned by an irregular indorsement, in consideration of a pre-existing debt, due from the indorser to the indorsee, the plaintiff, whether he sues on the indorsement, or the pre-existing debt, is equally bound to show proper diligence in endeavoring to collect the note from the maker.
4. Where a plaintiff sues the indorser, on his indorsement of a promissory note, his right to recover cannot be made out by proof of a fraudulent concealment, or misrepresentation by the indorser, of the maker's ability to pay.
5. An averment in a declaration on an irregular indorsement, that suit was commenced against the maker, "in the county, where he ordinarily resided, but that he could not, on diligent search and inquiry, there, and else where, in said State, be found," is not an averment of such diligence as will charge the indorser.
6. An averment in a declaration on an irregular indorsement, that the maker was at the time of the indorsement of the note, and has continued since,

a non-resident, and that the fact of his non-residence was at the time unknown to the plaintiff, is an insufficient averment to charge the indorser.

7. Where the note of a third person is indorsed, and delivered in absolute payment of a pre-existing debt, an action cannot be maintained on the original debt, but the remedy of the creditor is on the indorsement alone, unless the transfer of the note is affected with fraud, or misrepresentation as to the solvency of the maker.

8. Whether, or not, the transfer of a note, in consideration of a pre-existing debt, is an absolute payment, is a question of fact, to be determined by the jury.

9. If a note for more than $50, is indorsed and delivered by the holder to a third person, suit must be brought against the maker, to the first circuit or county court, to which he can be sued, next after the maturity of the note; and if the indorsee remits a part of the demand, so as to bring it within the jurisdiction of a justice of the peace, a suit in a justice's court, though prosecuted to a return of no property, is insufficient to charge the indorser.

Error to the County Court of Marengo. Before the Hon. James A. Young, Judge.

This was an action of assumpsit, by defendants, against the plaintiff in error, as the irregular indorser of a note, made by one Taylor, on the 1st February, 1842, for $50, in favor of Edward J. Rew, payable on the 1st day of March next after date. The common counts were added to the declaration, which contains four special counts on the indorsement. The first count, after setting out the making and indorsing of the note, avers, "that afterwards, to wit, &c. in the county of Greene, in the State aforesaid, where the said Taylor then ordinarily resided, suit was commenced upon said note, against the said Taylor, but that the said Taylor could not, on diligent search and inquiry there, and elsewhere in said State, be found, nor has he at any time paid said note, or any part thereof, whereby," &c. The second count avers, "that in the county of Marengo, and elsewhere in the State, diligent search and inquiry were made for said Taylor, and he could not be found," &c. The third count avers, "that at the time of the making of the said last indorsement, by the said defendant, the said Taylor was, and ever since continuously has been, a non-resident of the State of Alabama, and that the same was then and there unknown to the said plain-

tiffs, or either of them, nor has the said Taylor, at any time, paid said sum of money," &c. The fourth count avers, "that at the time of said indorsement, he was, and from thence continually has been, insolvent, and has not paid the note, or any part thereof," &c. The defendant below demurred to each count of the declaration, and the demurrer was sustained as to the second and fourth counts, and overruled as to the others.

A bill of exceptions was sealed on the trial, from which it appears, that the indorsement of the note by defendant below, was made on the 2d of April, 1842, and that in a day or two afterwards, it was placed in the hands of a justice of the peace in Greensborough, for suit, with directions that the constable should go to Newbern with the summons, where the defendant below, at the time of the transfer of the note, told the plaintiffs below, Taylor lived, and where, upon inquiry, he could not be found: that the note was transferred in part payment of an account held by defendants against plaintiff in error, the balance of which was settled by his own note, and the account receipted, and delivered to plaintiff in error: and that an indorsement of, "all over $50 hereof is relinquished," which appeared on the back of the note, was entered by the justice, when the note was handed to him for suit. It was not shown that Taylor had left the State, or was a non-resident, and the foregoing is, in substance, all the proof that was made.

Various charges were asked by the defendant below, one of which was, that if the sum due on the note at the time it was placed in the hands of the justice for suit, amounted to more than $50, a suit before the justice was not such a compliance with the statute, as would bind the indorser; which charge the court refused, and charged, that all that was due over $50, might be relinquished, so as to bring the case within a justice's jurisdiction; and if that was done, &c., suit then brought before the justice, it was a sufficient compliance with the statute, to hold the indorser liable. The defendant below further asked the court to charge the jury, that the taking of the note with defendant's indorsement, and the receipting of the account, as shown by the evidence, was a payment of the account to that extent, and barred a

recovery on the original account; which charge the court refused to give, but charged the jury, that the taking of the note indorsed by defendant, was not a payment of the account to that extent, unless it was expressly agreed that it should be in payment, and that it devolved on the defendant to prove such agreement.

The several refusals to charge as asked, and the several charges given, together with the overruling of the demurrer to the first and third counts of the declaration, are now assigned as error.

Vary, for plaintiff in error.

1. The plaintiff must state with certainty, and in clear and distinct terms, all the facts that make out his right of action. 1 Ch. Pl. 214, 223, 225.—1. The first count does not show how, or in whose name, nor in what court, suit was commenced, nor does it show that suit was brought to the first court to which suit could be brought, nor what proceedings were had in the suit. 2. It was not shown that the court had jurisdiction. A suit in a court which had not jurisdiction, would not bind the indorser. The statute points out distinctly, the courts in which suit must be brought. If the sum exceeds $50, it must be brought in either the circuit or county court, if not, then before a justice of the peace.—Clay's Dig. 383, § 12, 15.

2. The suit and proceedings before the justice of the peace, as in proof, were insufficient to charge the indorser. 1. The plaintiffs could not relinquish all over $50, and sue the maker, on the balance, before a justice of the peace, and thereby hold the indorser liable. 2. The liability of the indorser, under our law, is a particular and special liability. His contract is fixed, and ascertained in its character. 8 Ala. 250. 3. His indorsement is a guaranty, that the money can be made from the maker, by a suit in a particular court; and his contract is, that if the money shall not be made in that mode, and in that suit, at its termination, he (the indorser) will pay it. His undertaking is only on condition of a suit against the maker, and also not until the time when that suit will be terminated. In the ordinary course of the law, it would be at least twelve months, when the amount due was

for more than $50, before the indorser could even be sued; and such is his liability, such his undertaking, such his contract. It may be, that the maker of the note may reside in the county, and own no property there; and yet own lands and other property, in another county. In such case, if suit were brought against him in the circuit or county court, and judgment obtained, it would be a lien on his land throughout the State, and might be the means of saving his debt. The holder of the note, has no right to deprive the indorser of this advantage, without his consent; and yet he might do it, if he were permitted to release all of the amount due on the note over $50, and sue before a justice of the peace.

3. The taking of the note, with the indorsement of the defendant, as shown by the evidence, was, to that extent and amount, a payment of the account. Trotter v. Crockett, 2 Por. 411; 21 Wend. 450; 1 Hill, 516. The cases of King v. Dougherty, 2 Stew. 487; Nibbs v. Moody, 5 S. & P. 198, have no application to this case.

Brooks & Byrd, contra.

1. The taking from the original debtor, the note of a third person for a pre-existing debt, is no payment thereof, unless it be expressly agreed to be taken as payment, and at the risk of the creditor. Crockett v. Trotter & McGonegal, 1 Stew. & Por. 446; Lee's adm'rs v. Fontaine & Freeman, 10 Ala. 755; Owenson v. Moore, 7 Term R. 64; Muldon v. Whitlock, 1 Cowen, 306; Tobey v. Barber, 5 Johns. 68; Hoar v. Clute, 15 Ib. 224; Chastain v. Johnson, adm'r, 2 Baily, 574; Bowers v. The State, 7 Har. & Johns. 32; Clopper v. Union Bank, Ib. 92; Hart v. Boller, 15 Ser. & Rawle, 162; McGinn v. Holmes, 2 Watts, 121; Herring v. Sawyer, 3 Johns. Cas. 71; Murry v. Governeur, 2 Ib. 478; Higgins v. Packard, 2 Hall, 547; Coxe v. Hawkinson, Coxe, 85; Kennel v. Mungy, Pick. 273; Bill v. Porter, 9 Conn. 23; Putnam v. Lewis, 8 Johns. 389; Whitlock v. Van Ness, 11 Johns. 290; Bates v. Ragland, 6 Ala. 668. And the taking of the note, and giving a receipt as for so much cash, in full for the original debt, does not amount to evidence of such express agreement. Lee's adm'rs v. Fontaine & Freeman,

10 Ala. 755; Bates v. Ragland, 6 Ala. R. 668; Muldon v. Whitlock, 1 Cowen, 306, and the several cases *supra*. The agreement must be clearly and explicitly proved by the original debtor, or he will still be held liable.

2. When more than $50 is due on a contract, plaintiff may relinquish all over that sum, and sue before a justice of the peace. King v. Dougherty, 2 Stew. 487; Bond v. Nicols, 2 Por. 86; Nibbs v. Moody, 5 S. & P. 198. And if the indorsee does so, the indorser cannot complain—it can work him no injury—it is analogous to a suit against the maker, before the expiration of the time agreed upon between indorser and indorsee. 5 Ala. R. 380.

3. Due diligence was used to charge the indorser. The maker could not be found where the indorser said he resided, and he had no known place of residence in the State. No suit was therefore necessary. Roberts v. Kirkpatrick, 5 S. & P. 96.

4. The second charge asked for was correctly refused. The plaintiffs below did not rely upon any suit to charge the indorser. They relied upon facts set up in excuse, for not sueing, &c. This charge prayed was abstract; and the remaining charge asked for, is liable to same objection.

5. The demurrer to the first count in the declaration, was correctly overruled. It contains a sufficient excuse for not sueing, &c. But, at all events, the plaintiff in error is not injured: other counts are sufficient, and under them, he had the full benefit of his defence; and the defendants were bound to make the same proof which was necessary to recover under the first count, if it had been good. The court ought not, therefore, to reverse. Shippey et al. v. Eastwood, 9 Ala. 198; Rakes v. Pope, 7 Ib. 166; Shehan v. Hampton, 8 Ib. 942.

CHILTON, J.—In Jordan, use, &c. v. Garrett, 3 Ala. R. 610, it was held that an irregular indorsement on paper not mercantile, is not provided for by the act of 1828, and that the liability thereby created is, that the assignor is liable to pay the debt, if by the use of proper diligence, it cannot be obtained from the maker. It is also added, that the question of diligence is one of fact, to be found by the jury, but that to

constitute such diligence, the maker must be sued to the first court after the maturity of the note, unless some valid reason, such as the insolvency of the maker, excused it. This case has been repeatedly recognized since, as correctly settling the law. See Hall et al. v. McCampbell, 3 Ala. Rep. 635; Nesbit v. Bradford, 6 ib. 746; Milton v. DeYampert, 3 ib. 648; Bank v. Gaffney, 9 ib. 159. So also when the note of a third person is indorsed by an irregular indorsement, in consideration of a precedent debt due from the indorser to the indorsee, the plaintiff, whether he declare upon the indorsement or upon the original consideration, is equally bound to show due diligence in respect to the collection of said note, and that it still remains his property. Bates v. Ryland, 6 Ala. Rep. 673-4.

It is also settled, that where the action is brought upon the indorsement of a promissory note, the plaintiff's right to recover cannot be made out by proof of a fraudulent concealment, or misrepresentation by the indorser in respect to the ability of the maker to pay, but to make such a fraud available as a ground of action, it must be specifically declared on in a suit brought by the party defrauded. Bank v. Gaffney, 9 Ala. Rep. 153.

Applying these principles to the case before us, we shall have little difficulty in arriving at a correct conclusion in respect to the first and third counts, to which demurrers were interposed in the court below, and overruled.

The first count, after averring the indorsement of the note to the plaintiffs, continues, "and the said plaintiffs aver that afterwards, to-wit, on the day and year aforesaid, in the county of Greene, in the state aforesaid, where the said Taylor, the maker, ordinarily resided, suit was commenced upon said note against said Taylor, but the said Taylor could not, on diligent search and inquiry there and elsewhere in said state, be found; nor hath said Taylor paid said note, &c." Does this count show the exercise of such diligence by the holders as to charge the indorser? It does not show that the maker removed beyond the jurisdiction of the court after the note was indorsed, so as to bring the case within the principle decided in Woodcock v. Campbell, 2 Porter's Rep. 456; neither does it advise us as to the court in which suit was com-

menced, or what has been done in such suit, or that the defendant was insolvent. That the defendant could not be found, upon diligent search and inquiry, when the suit was first instituted, is a sufficient excuse for not proceeding to judgment at the first term at which such judgment might otherwise have been rendered, but does not excuse the party from proceeding afterwards to collect the demand, if the maker was solvent, and it could have been collected.

The third count deduces the defendant's liability on the indorsement, from the fact, that the maker, at the time of the indorsement, and since that time, to the bringing of this suit, was a non-resident of this State, which fact of non-residence, was unknown to the plaintiffs at that time. It is not pretended that the plaintiffs were defrauded, or that the defendant was under any obligation to communicate the non-residence of the maker to them. We know of no principle of law, in the absence of fraudulent or false representations as to the residence of the maker, or a suppression of the truth, which would amount to a fraud, which would authorise the plaintiff to recover, upon the isolated ground, that he did not know of the maker's non-residence. Suppose neither party knew whether or not Taylor resided without the State, but plaintiffs contracted, risking that matter, it would be going too far, to hold that the plaintiffs should not be held to any diligence to collect the note. This hypothesis is consistent with the count, as the plaintiffs do not aver that they were in any way deceived, by their want of a knowledge of the maker's residence. But if they were deceived, we have shown they must declare for the deceit, and not upon the indorsement. The Bank v. Gaffney, *supra.*

What we have said, as applicable to the counts, is a sufficient indication of our views in respect to the points raised by the bill of exceptions. The clerk of the plaintiffs, who received the note indorsed by the defendant, swears that it was received in *part payment* of the amount. The remainder of the account for which the defendant, at the time, executed his own note, has been paid, and the account was receipted, as paid, and delivered to the defendant. There being an express agreement that the note should operate as a payment, it is very clear the plaintiffs cannot recover upon the account,

unless it could be shown that the note was void, and therefore constituted no consideration for the contract. See the authorities collected in Lee's adm'r v. Fontaine & Freeman, 10 Ala. Rep. 755; see also Moore v. Briggs, at the present term.

The rule is, that where the note of a third person is indorsed and transferred as an *absolute payment* of a pre-existing debt, then no action can be had on such debt, or its original consideration, and the creditor must seek his remedy on the paper so transferred, unless the note be a forgery, or fraud be committed in the transfer, by false representations as to its value, &c. Trotter v. Crockett, 2 Porter's Rep. 401.—Whether the substituted note was intended as a payment absolutely, or was received as collateral, or as a conditional payment, is a fact to be ascertained by the jury. If received as a payment, absolutely, and there be no fraud, and the note creates a liability upon the maker, then the plaintiffs, being compelled to resort to the contract evidenced by the indorsement, must show that they have used due diligence to collect it from the maker. This is also a question of fact for the jury, to be ascertained, subject to the rules which the law furnishes for their guidance. If the note, adding the interest, amount to more than fifty dollars, the plaintiff must sue to the first court to which the suit could be brought, or must show that such suit would have been unavailing. If he releases a part of the debt, and seeks his remedy in a forum not in the contemplation of the parties at the time the contract was entered into, and which, without such release, had no jurisdiction of a suit upon the note, it is the same as though no suit had been commenced. The law regulating the indorsement becomes incorporated into and forms part of the contract. This law required the plaintiffs to sue in the circuit or county court, in which event, had the party obtained a judgment, a lien co-extensive with the State, would have attached upon the lands of Taylor. In suing before a justice, to whom they give jurisdiction by their release, they violate this implied stipulation in the contract of indorsement, and therefore may not make their violation of the contract, the ground for a recovery against the indorser.

It follows, from what we have said, that the court should have charged the jury, that the proceedings had before the justice, as the same appears in proof, did not entitle the plaintiffs to recover upon the indorsement; not that the proof, having been admitted without objection, was illegal, but that it did not amount, in legal contemplation, to the exercise of due diligence.

These views are deemed sufficient to guide the primary court, in its future action upon the case. Let the judgment be reversed, and the cause be remanded.

McGUIRE, Adm'r, v. MILLER.

1. Though, as between the grantor, and grantee, of a fraudulent deed, the deed is obligatory, yet a *bona fide* purchaser from the fraudulent grantor, or his representative, may insist on the fraud in avoidance of the deed.

Error to the Circuit Court of Tuscaloosa. Before the Hon. T. A. Walker.

This was an action of detinue, brought by the plaintiff's intestate, and renewed after his death, in the name of the plaintiff in error. On the trial, a bill of exceptions was taken to the ruling of the circuit judge, which shows that the plaintiff, to show title on his part, introduced and read, a deed of trust executed by Peter Donaldson, of the first part, and Drish and Hodges, of the second part, by which deed, the slave in controversy, with other property, was conveyed to Drish and Hodges, and by the terms of the deed, the slave was to be delivered, and conveyed to William H. Crawford Donaldson, the son of the grantor, as soon as he should become of lawful age. The deed also provided for the other members of the family of the grantor, and contains a covenant, or reservation, that the slaves, and other property, shall remain in possession of the grantor, free of hire, or rent, un-

til the time should arrive, at which the trust in favor of the children should be executed, by delivering to each, the property allotted to him or her by the deed.

The plaintiff also proved, that the intestate, William H. C. Donaldson, was the same person mentioned in the deed, and that the slave sued for, is the same allotted to him. That the administrator of the grantor, Peter Donaldson, had sold said slave a few days after the intestate had become of age, by order of the orphans' court of Tuscaloosa, and the defendant became the purchaser at such sale. The deed of trust bore date in 1831, and had been recorded within proper time, but was probated before a justice of the peace.

The defendant proved, that prior to the sale of the slave, by the administrator of the grantor, his estate had been declared insolvent, and also proof tending to show, that the deed was fraudulent in fact, and was made with the intent to defraud creditors, residing at the time in the State of Georgia. It was also proved, that the plaintiff's intestate was present at the administrator's sale, and made no objection, but asked one of the witnesses to bid off the slave for him, and that he would pay him when he got able. The plaintiff proved that all the debts due in Georgia, had either been avoided by the grantor, by the plea of the statute of limitations, or had been otherwise arranged, before the accruing of any of the debts on account of which the estate of the grantor was declared insolvent; and that at the time of declaring the estate insolvent, there existed no debt which accrued before the making of the deed; and that after the execution of the deed, the grantor became, and for some time continued, solvent, though he died in embarrassed circumstances.

The counsel for the plaintiff requested the court to charge the jury, 1. That the fact that the deed was intended to hinder, and defraud non-resident creditors, whose debts had become barred by the statute of limitations, would not bar a recovery in this action.

2. That although the deed was fraudulent, yet it was valid against the grantor, and his administrator, and consequently against the purchaser at the administrator's sale, the deed having been duly proved and recorded.

These charges the court refused to give, but charged, that

if the deed was fraudulent in its inception, it was void, to all intents and purposes, as to this case, and the plaintiff could not recover. Under this charge, the plaintiff took a non-suit, and excepted to the charge given, as well as to the refusal to charge as requested.

P. & J. L. Martin, for the plaintiff in error.

1. A deed, though fraudulent as to creditors and purchasers, is valid between the grantor and grantee, and may be enforced. Rochelle v. Harrison, 1 Ala. 237; Eddins v. Wilson, 8 Por. 357.

2. A conveyance of property, though void as to existing creditors when made, is valid between the parties, and also against subsequent creditors, with notice of such conveyance.

3. A purchaser of property at an administrator's sale, can acquire no better title than the intestate held at the time of his death, in the article sold.

E. W. Peck, contra.

1. The deed under which the plaintiff's intestate claimed to recover the slave in this case, was fraudulent and void; it was not only fraudulent as a voluntary deed, but the actual intent of the deed, as proved by the witnesses, Drish and Braly, was to hinder and delay creditors.

2. Again, the possession of the property was never out of the pretended donor; he continued in the possession to the time of his death. The possession then, went to the administrator as a part of the estate, was inventoried and appraised as such, was ordered to be, and was actually sold as such—the plaintiff's intestate being present, and setting up no claim, but actually asked the witness, Braly, to buy the slave for him, and he (intestate) would pay him when he was able.

3. Furthermore, the deed, although recorded, was no notice, because it was not proved, as required by the statute of frauds; it was not proved either in the circuit or county court; proof before a magistrate was a mere vain act. But more, at the time this probate was made, one justice could not take the probate of any deed required to be recorded. The act of 1836, was the first act that gave this power to one justice. Clay's Dig. 157, § 39. The probate of this deed

was made in 1831; but I am not driven to this argument in this case, for the deed being a voluntary deed, is expressly declared void as to creditors and purchasers, unless proved in the circuit or county court. The defendant in error, therefore, was a *bona fide* purchaser for valuable consideration, and without notice, and consequensly not affected by the deed of gift.

DARGAN, J.—It is contended, that although the deed may have been fraudulent in its inception, and intended to delay, and hinder the creditors of the grantor, yet it was valid as against him, and his administrator; and being valid as against the grantor, and his administrator, it must also be valid against a purchaser at the administrator's sale.

It is very certain, that a recovery could not be resisted, on the ground of the fraudulent intent with which the deed was executed, if the suit was brought by the grantee, against the fraudulent grantor, or his administrator; for the statute which declares the deed void as to creditors, and *bona fide* purchasers, makes it valid as against the grantor and his representatives. Rochelle v. Harrison, 8 Por. 357; Eddins v. Wilson, 1 Ala. 237. But the question is entirely changed, when the suit is brought by the fraudulent grantee, against a *bona fide* purchaser of the grantor, or of his administrator. Such a purchaser may insist on the fraud in avoidance of the deed, by the express terms of the act. Eddins v. Wilson, 1 Ala. 237. And notwithstanding the deed is valid against the grantor, yet if he retain possession, and sell for a valuable consideration to another, such a purchaser will acquire a valid title to the chattel, and the title of the fraudulent grantee, will be defeated by it.

The ruling of the court accords with the view here taken, and the judgment is affirmed.

REYNOLDS v. REYNOLDS.

1. An award must conform to the submission, under which it is made.
2. If arbitrators transcend their authority, the award, *pro tanto*, will be void, but it will be good as to the residue, unless that which is void so affects the merits of the submission, that it cannot, without injustice, be separated from the balance.
3. Every reasonable presumption will be made in favor of an award, and if, by the application of this principle, it can be brought within the submission, and is, in other respects, unobjectionable, it will be sustained.
4. An award is not objectionable for want of mutuality, which directs the payment of a sum of money by one party to the other, without prescribing any act to be done by the latter.
5. Where, under the submission of a cause, pending in court, to recover the amount of a bill single for $1,000, due the 1st of March, 1846, wherein I R is plaintiff, aud W R is defendant, and in which the defendant has pleaded failure of consideration and fraud, the arbitrators award, "that the said W R, defeudant, shall have and hold, the right, title and interest, in, and to the negro boy, Nelson, and that in consideration of the same, the note for $1,000, payable the 1st day of March, 1846, drawn in favor of I R, and signed by W R, be paid, and that W R, the defendant, pay the costs of the suit:" Held, 1. That the fair inference from the pleadings, and the language of the award, is, that the slave was the consideration of the bill single, and that the arbitrators merely decided, that neither of the defences, set up by the defendant, was valid. 2. That the award is not void for uncertainty, either in not naming the person to whom the money is to be paid, or in not specifying the amount of costs. 3. That in determining, that the defendant should pay the bill single, the arbitrators must be understood, as meaning, that he should pay it, according to its legal effect, with interest.

Error to the Circuit Court of Pickens. Before the Hon. S. Chapman.

THE defendant instituted an action in Pickens circuit court, against the plaintiff in error, on a bill single for $1,000, dated 14th October, 1841, and payable the 1st March, 1846. Pleas—1. Want of consideration. 2. Failure of consideration. 3. Fraud.

The record recites, that at the spring term, 1847, the par-

ties appeared by their attorneys, and it is agreed, that this cause be submitted to the arbitrament of Samuel G. Cochran, Bennett Atkinson, William Hughes and Joel Pearson, and that their award is to be made the judgment of the court. Four days afterwards, the arbitrators returned into court their award, in which they say, "in pursuance of said order, or rule of reference, having heard both the said parties, their allegations and answers, touching the matter in difference between them, and having thoroughly considered of the same, [we] do award, order and adjudge, of and upon the premises, in manner and form following: 1. That the said William Reynolds, defendant, shall have and hold the right, title and interest, in and to the negro boy, Nelson, and that in consideration of the same, we confirm, and order, or decree, that the note for $1,000, payable the 1st day of March, 1846, drawn in favor of Irby Reynolds, and signed by William Reynolds, be paid, and we do further award, that William Reynolds, the defendant, pay the costs of the suit."

At the fall term, 1847, the counsel of defendant in error moved the court to have the award entered as the judgment of the court, which was resisted by the plaintiff, on the grounds—1. That the arbitrators considered matters not referred to them. 2. That the award was not for any certain amount. The court overruled the objections, and entered judgment for $1,000, the principal sum of the bill single, with the further sum of $132, it being the legal interest thereon, from the 1st March, 1846, to the date of the judgment, and the costs of the suit. The rulings and judgment of the court, are now assigned as error.

Huntington, for plaintiff in error.

1. When it appears from the record of the judgment of the court, that the award did not decide the matters in controversy between the parties, the objection may be made for the first time in this court. Price v. Kirby, 1 Ala. 184.

2. The arbitrators assumed to adjudge, that the title of a negro boy named Nelson, should be in William Reynolds, and in consideration of a title supposed to be vested in him by their decree, or award, they directed him to pay the sum

of $1,000, with interest, costs, &c. This is a matter that could not arise under the pleadings. If the basis of the plea of want of consideration was, that the note was given for the negro Nelson, and that this negro belonged to a third person, who had always retained him, to the exclusion of the plaintiff in error's possession, then the title of this third person was no matter before the arbitrators, which they could control by their award; so in regard to the plea of failure of consideration, if the plaintiff in error had been compelled to surrender the negro to a third person having a superior title. Their award, therefore, is void. Martin v. Williams, 13 Johns. 264.

3. The award can only have the effect to vest the title to the negro in William Reynolds, as against Irby Reynolds. But if the note was given for the negro, then such was the state of the title before the award was made. The arbitrators, therefore, awarded nothing to William Reynolds, yet made that *nothing*, the consideration for which he is to pay the $1,000. If an award directs the performance of acts by both parties, and the award, as to the acts to be done by one of the parties, is void, and the void part is the consideration, or recompense of the thing awarded on the other side, the whole award fails. Nichols v. Rens. Mut. Ins. Co. 22 Wend. 129. In Pope v. Butt, 3 Saund. 292, the award was, that Butt should pay Pope the money due him "as well for task work as for day work," and then Butt should pay Pope £25, and mutual releases of all demands be executed. The court held the award wholly void, because Pope was awarded to pay £25, and execute a release, upon the supposition by the arbitrator, that he was first to receive pay for his task work and day work by virtue of that award, whereas he could have no remedy thereon, because no particular amount for such work was specified. So the award in the case at bar is void, because William Reynolds can have, upon the award, no action for that which is the consideration upon which he has been awarded to pay the money.

4. It is an admitted principle, that an award must be confined to the subject matter of the submission. In the present instance, by the rule of court, simply the cause was submitted to the arbitrators; in other words, that was submitted to

the arbitrators, which, without their appointment, would have been submitted to a jury. Harding v. Beattie, 4 Dev. & Bat. 381; Duncan v. Duncan, 1 Ire. 467; 2 Chit. Gen. Pr. 106. This was merely the issues upon the pleas filed. They had therefore merely to inquire, whether a want or failure of consideration, or fraud, could be set up against the instrument sued on. By their award, they virtually admit that some one of these defences existed, and attempt to do away with the grounds of such defence, by applying a remedy of their own invention. This supposed remedy they make the consideration, or basis, of their award against the plaintiff in error. But it has been shown, that while this part of the award, which is the consideration of the other part, professes to confer a benefit upon William Reynolds, it actually confers none. In attempting to apply this futile remedy against a defence, which by the attempt itself is admitted to exist, the arbitrators have not only gone beyond the submission, but have done a void act, which is so connected with the rest of the award, as to affect the justice of the case between the parties. The award, therefore, is void for the whole. Kyd on Aw. 246; Brown v. Hankerson, 3 Cow. 70; Huff v. Parker, 3 Yeates, 567; see also Duncan v. Duncan, 4 Ire. L. R. 467.

5. The judgment of the court does not follow the award, because the judgment does not say that the title to the boy Nelson shall be vested in William Reynolds. Nor would the court have had the power to enforce such a judgment, if it had been rendered. The arbitrators intended a benefit to William Reynolds, and charged him $1,000 for that which they intended. The court could make him pay the money, but could not help him towards the enjoyment of its supposed equivalent. In Kunckle v. Kunckle, 1 Dall. 364, the court say, "where a report of referees awards money to be paid on one side, and certain other things to be done upon the other, if the court cannot enforce both, they certainly will enforce neither." According to this principle, the court below erred in the partial judgment which it rendered upon the award.

S. F. Hale, contra.

1. Under the provisions of our statute, great liberality is ex-

tended to the awards of arbitrators, and it will not be set aside for any want of form, or other irregularity, if the matter in controversy is decided by the award, unless it is procured by fraud, corruption, or other undue means, which is not pretended in this case. Clay's Dig. 50, § 2, 3.

2. No objection can be urged against an award, in this court, that was not raised in the court below; and all irregularities or defects not insisted on in the court below, are waived, and are not available on error in this court. Price v. Kirby, 1 Ala. 184.

3. The first objection urged against the award in the court below, is, that the arbitrators considered matters not referred to them. This objection cannot be available, for two reasons—1. It is necessary to state what matter it was that they considered, which was not referred, so that the court might determine whether, or not, it was relevant; and 2. Whether, or not, the matter improperly considered by the arbitrators, has any necessary connection with the real matter in controversy, for if it has not, then it will not vitiate the award on the matter referred. 22 Wend. 129, and cases there cited.

4. Every presumption, not directly inconsistent with the record, will be entertained by the court, to sustain the award and the judgment thereon, so that the party impeaching it must show affirmatively on the record, the facts which vitiate the award, and judgment thereon, which is not attempted in this case. Tankersly v. Richardson, 2 Stew. 130.

5. The second, and only remaining objection, urged in the court below, is, that the award is not for any certain amount. This objection is certainly not sustained by the record. The award is, that the note for a specific sum of money, due at a specified time, shall be paid. This is sufficiently certain for all legal purposes. *Certum est quod, certum reddi potest.*

6. The argument of the plaintiff in error, is based upon facts which no where appear on the record, and therefore cannot have any weight. So far as the record shows, the only question submitted to the arbitrators was, whether the defendant below should pay the note sued on. They, by their award, say that he must pay it. The other part of the award is merely surplusage, and will not vitiate. The court below so regarded it.

COLLIER, C. J.—It is well settled, that an award must conform to the submission under which it is made. Adams v. Adams, 8 N. Hamp. Rep. 82; Solomons v. McKinstry, 13 Johns. Rep. 27; Bean v. Farnam, 6 Pick. Rep. 269; Stevens v. Gray, 2 Harring. Rep. 347; Gibson v. Powell, 5 S. & Marsh. Rep. 712; Lee v. Onslott, 1 Arkansas Rep. 206. If, therefore, arbitrators transcend their authority, *pro tanto* their award will be void, and will stand good for the residue, unless that which is void, affects the merits of the submission, so that it cannot, without injustice, be separated from it; but if it forms the consideration for what the other party is required to do, the award will be void *in toto*. Taylor v. Nicholson, 1 Hen. & Munf. Rep. 67; Skillings v. Coolidge, 14 Mass. Rep. 43; Martin v. Williams, 13 Johns. Rep. 264; Cromwell v. Owings, 6 Har. & J. Rep. 10; Gordon v. Tucker, 6 Greenl. Rep. 247; McBride v. Hagan, 1 Wend. Rep. 326; Brown v. Warnock, 5 Dana's Rep. 492; Huff v. Parker, 4 Dall. Rep. 285; Gomez v. Garr, 6 Wend. Rep. 583; Id. 9 Wend. Rep. 649; Young v. Shook, 4 Rawle's Rep. 299; Banks v. Adams, 10 Shep. Rep. 259.

All reasonable presumptions shall be made in favor of awards; and if, by the application of this principle, an award can be brought within the submission, and is in other respects unexceptionable, it will be sustained. Tankersly v. Richardson, 2 Stew. Rep. 130; Armstrong v. Armstrong, 1 Leigh's Rep. 491; Parsons v. Aldrich, 6 N. Hamp. Rep. 264; Van Landingham v. Lowery, 1 Scam. Rep. 240; Caton v. McTavish, 10 Gill & J. Rep. 192; Karthans v. Ferrer, 1 Pet. Rep. 222; Fryeburg Canal v. Frye, 5 Greenl. Rep. 38.

An award should be so certain as to enable the court to determine what it decides. McKeen v. Oliphant, 3 Har. Rep. 442; Gibson v. Powell, *supra;* Hazeltine v. Smith, 3 Verm. Rep. 535; Dubury v. Clifton, Cooke's Rep. 329; Carter v. Ross, 2 Root's Rep. 507; Purdy v. Delavan, 1 Caine's Rep. 304; Gonsales v. Deavans, 2 Yeates's R. 539; Kingston v. Kincaid, 1 Wash. C. C. Rep. 448; Borrets v. Patterson, 1 Taylor's Rep. 37. Under the influence of this rule, it has been held, that an award which directs one party to pay to the other a certain sum within a prescribed time after the date of the award, with interest until paid, is sufficiently

certain. Skeels v. Chickering, 7 Metc. Rep. 316. So an award for a sum certain, and "the costs," was adjudged good; it being also said, that if it was uncertain, in not stating the amount of the costs, it would still be good as to the debt. Brown v. Warnock, 5 Dana's Rep. 492. And an award for "the amount of the note" in controversy, has been held not obnoxious to the objection of uncertainty. Coxe v. Gent, 1 McMullen's Rep. 302.

Although awards must be mutual, yet an award is not objectionable for the want of mutuality, which merely directs the payment of a sum of money by one party to the other, without ordering a release or other act to be done by the one who is to receive it. Gordon v. Tucker, 6 Greenl. R. 247; Doolittle v. Malcom, 8 Leigh's Rep. 608. If both parties are required to do certain acts, and as to those to be done by one of the parties, the acts are void, and the void part is the consideration of the acts required to be done by the other party, the award will be inoperative *in toto*. Nichols v. Rens. Ins. Co. 22 Wend. Rep. 125. It is, however, said to be no valid objection to an award, that both parties will not have the same remedy to enforce performance; one party may be entitled to recover money by judgment or action, and the other to enforce a compliance by an attachment. Kunckle v. Kunckle, 1 Dall. Rep. 364. Nor is an award defective for want of mutuality, because it directs one party to perform something on his part before the other releases, where the thing to be performed is independent of the release. But where it directs money to be paid on one side, and some other thing to be done on the other, if the court cannot enforce both, they will enforce neither. Kunckle v. Kunckle, *supra*.

In Cox v. Jugger, 2 Cow. Rep. 638, it was held, that when one part of an award was irreconcileable with another, the latter should be disregarded.

This hasty sketch of legal principles, may suffice to furnish a guide to a correct conclusion. In the case at bar, the action was founded on a bill single, dated the 14th October, 1841, by which the defendant promised to pay the plaintiff the sum of $1,000, on the 1st of March, 1846. The defendant pleaded—1. Want of consideration. 2. Failure of con-

sideration. 3. Fraud. Thereupon an order was made, by consent of parties, to refer the cause to the arbitrament of certain persons, whose award was to be made the judgment of the court. The arbitrators made their award, in which they say, they have *thoroughly considered the matters in difference*, and *upon the premises adjudge*, "*First*, that the said William Reynolds, defendant, shall have and hold the right, title and interest, in, and to, the negro boy, Nelson, and that in consideration of the same, we confirm, and order or decree, that the note for $1,000, payable the first day of March, 1846, drawn in favor of Irby Reynolds, and signed by William Reynolds, be paid. And we do further award, that William Reynolds, the defendant, pay the costs of the suit."

As it respects the slave, it does not appear that he was in the possession of the plaintiff, or that the plaintiff was required to do any act to invest the defendant with the title to him. But the fair inference from the pleadings, and the terms in which the award is expressed, is, that the slave was the consideration of the note, and that the arbitrators merely decided, that there was nothing in his condition, or the circumstances under which the defendant purchased him, that furnished a valid reason why the plaintiff should not recover. This conclusion is the natural result of the principle which declares that all reasonable intendments shall be indulged in favor of awards. It seems to us, that this interpretation is so palpably just, as to allow no scope for argument, and is sufficiently illustrated by its statement.

It is no objection to the award, that it does not direct, *in totidem verbis*, to whom the *note was to be paid*. The action was brought by Irby Reynolds, the payee, and himself, and the defendant submitted the cause to arbitration, so that there is no ground for the objection of a want of certainty in this respect. In Callahan v. McAlexander, 1 Ala. Rep. 366, the judgment of the circuit court sustaining an award was reversed, because the award did not determine who should pay the money. But that case was submitted before suit brought, by a reference out of court, pursuant to the statute. Besides, it appeared *prima facie* from the record, that another person than the defendant in the judgment, was liable

to pay the plaintiff; and upon this ground, this court rested its opinion.

To entitle the plaintiff to his judgment, no act was necessary as a condition precedent. If the slave referred to, in the award, was not in the possession of the defendat, or subject to his control, he should have made proof of the fact, and urged it to the circuit court as a reason why the plaintiff should not recover. There is no basis, in the absence of proof, upon which we can rest a presumption in his favor. If the consummation of the defendant's title required any thing more than the award, so far as the plaintiff is concerned, it will become perfect by the satisfaction of the judgment—the receipt of the money will estop the plaintiff from asserting an adversary right.

As it respects the costs, they can be ascertained by the clerk, as in other cases, and the failure of the arbitrators to ascertain the amount with exactness, cannot prejudice their award. In determining that the defendant was liable to pay the note, they must be understood to charge him according to its legal effect, with the interest; which the clerk was also competent to compute. The citations on this point are direct, and establish the correctness of our conclusion.

The consequence is, that the judgment must be affirmed.

SUMMERLIN, Adm'r, &c. v. GIBSON, et als.

1. A voluntary deed for slaves, delivered to the donees, but reserving to the donor a life estate in them, operated as a present gift, and vests the title immediately in the donees.

Error to the Chancery Court of the 19th District. Before the Hon. David G. Ligon, Chancellor.

The bill in this case was filed by plaintiff, as administrator, &c., of one Robert S. Carson, against the defendants in

error, to set aside a deed of gift, absolute on its face, for certain slaves, executed by said Carson, in his life-time, to said defendants, and for the delivery of said slaves to him to be administered, &c. The facts, on which the relief is sought, the answers of defendants, and the testimony read on the hearing, are sufficiently set out in the opinion of the court.

The chancellor dismissed the bill, and it is now assigned as error.

Evans and Boling, for plaintiff.

Although this instrument be in the form of a deed of gift, and called such, still its purpose is testamentaty. It is only to be consummated by death, and is not to operate during life. It might be probated as a will. Dunn and wife et al. v. Bank of Mobile, et al., 2 Ala. R. 152; Lovelass on Wills, 317; top page 170, to be found in 25 Law Library; Henry v. Ballard, 2 Caro. Law Repos. 595: Lyles v. Lyles, 2 Nott & McCord's Rep. 531; Milledge v. Lamar, 4 Dess. Rep. 617; 10 Bacon's Abr. 480.

If necessary to effectuate the intention of the donor, such deed may be regarded as a testamentary paper, and operate as such. 2 Ala. Rep. *supra*, and authorities cited. See also, the opinion of the court in this case; Gibson et al. v. Carson, adm'r, 3 Ala. Rep. 421: 1 Eq. Dig. 408, § 42.

Hunter, contra.

I. No surprise is shown, such as is necessary to set aside a deed; on the contrary, it is shown by the proof, that Carson did precisely, what he intended. The case made by the present testimony differs from that of Gibson v. Carson's administrator. 3 Ala. Rep. 421, in this—1. Minter proves that Carson regarded the papers executed by him, as deeds of gift; and not wills, after the commencement of his former suit. 2. The expression "will" is fully explained by Burns and West. 3. He was cautioned by Gibson, and money paid. 4. Carson's shrewdness proved, even when drunk, and capacity to understand the difference between a will and a deed. 5. Did not say it was in place of a will. 6. Reason of making his mark different, shown. 7. Long contemplation of doing what he did, proved. 8. Not one expression

proved, showing that he did not understand the force and nature of deeds. 1 Story's Eq. Pl: 261 § 251; ib. 133, note 5. 9. The force of the old testimony is completely broken by the explanations now given by those witnesses, and two new witnesses prove beyond question that he never regarded the deeds as revocable, or in the nature of a will.

II. Statute of limitation and staleness of the demand. This point is regarded as entitled to much force. Johnson v. Johnson, 5 Ala. Rep. 90.

III. Proper parties defendant not made. Relief is sought against the estate of Thomas Gibson, deceased; and his administrator should be a party.

CHILTON; J.—The law as applicable to this case, was settled by this court, in the case of Gibson et al. v. Carson, 3 Ala. Rep, 421. The bill in that case was filed by the grantor in the deed, to Mrs. Gibson and her children, to set it aside for fraud in obtaining it. The proof failed to make out the fraud complained of, but the court was of opinion that the facts and circumstances *then* in proof, showed a case of surprise, which would authorize the setting aside the deed. The bill however, not being adapted to the proof, was dismissed without prejudice.

After the death of Carson, and the marriage of his widow with Summerlin, the complainant, this bill is filed by him to recover from the children of Gibson, and the husband of one of them, the slaves which are conveyed by the deed, the complainant being the administrator of Carson's estate.

The present bill insists that the deed was not only obtained by over persuasion and fraud, but was intended to operate as a testamenrary paper, to take effect only after the death of Carson—that it was revocable at his pleasure, and that he did revoke it by making a subsequent will, bequeathing the slaves to the wife of complainant, Summerlin, and her children.

The answers admit the execution of the deed. and deny that it was improperly obtained, or intended to operate otherwise than as a deed of gift.

The only question for us to determine is, whether the deed

is to be considered a testamentary paper, and revoked by the subsequent will, or a conveyance irrevocable in its character.

Since the case was in this court upon the bill of Carson, several additional witnesses have been examined, and the testimony now before us, places a very different aspect upon the case from that which it bore when then here. Let us briefly recur to the proof.

Minter proves, that after Carson had commenced the former suit, he told the witness he had executed a deed of gift for the slaves in controversy, and that he had also executed a similar deed for the land to Robert and Matthew Gibson. That he never would have called for the deeds, but the transaction impaired his credit. That Carson designated the instrument as a *deed of gift.*

Burns, who is one of the subscribing witnesses to the deed, and who had been examined in the previous suit, does not now recollect that Carson, at the time of executing the deed, used the word 'will;' if he did, that he used it as synonymous with wish or desire, and not to designate the instrument as a will or testamentary paper.

West, the other subscribing witness and Burns, both prove that Carson said nothing indicating a desire or meaning on his part, that the deed should operate as a will. That the deed was read to Carson, who was sober, and in the enjoyment of his reason, and Gibson cautioned him to be satisfied with it before signing it, that he might not regret it thereafter; that Carson replied, "it was just as he wished it, or willed it, or words to that effect." West proves that Carson remarked at the time of executing the deed, that he had intended, for a long time, to convey his property to his grandchildren, not because he was in debt, but for the natural love and affection he had for them. The witnesses further prove, that after the deed was executed and delivered by Carson to Gibson, Carson observed to Gibson, "you are not to trouble this property during my life-time;" to which the latter replied, "certainly not."

It further appears, by the declarations of Carson, made cotemporaneously with the execution of the deed, "that his (Carson's) wife had, for a long time, been persuading him to

execute a conveyance similar to the one he was then about to execute; that he had then got his own consent; that Mrs. Gibson was all the child he had or expected to have; that it would save him the trouble of making a will," &c.

It is further shown, that Gibson did not use any improper influence over Carson to induce him to execute the conveyance, but in the language of the witnesses, "his influence was used to put the matter fairly before the mind of the old man, so as to prevent him from doing any thing that he might afterwards regret."

The witnesses further state, that Carson, when intoxicated, would not trade,—that when sober, he was a tolerably shrewd man, and at the time he made the deed to Mrs. Carson and the children, knew very well what he was doing.

There can be no question, however, that it was the understanding at the time, that Carson should not be disturbed in the enjoyment of this property during his life, and we will consider the deed, as though this provision had been inserted in it.

Can such an instrument take effect as a deed? Several decisions of this court, we think, very clearly show that it becomes operative as a conveyance *in praesenti*, so as to vest the title in the donee and her children, although the enjoyment of the property may be postponed until after the death of the donor. In Wilkes's adm'r v. Greer et al. 14 Ala. Rep. 437, the donor, by deed, conveyed property (slaves) to his two daughters, providing in the deed, that he was to have the use of them during his life, and if his wife survived him, she was to retain them during her life, then to the daughters, their heirs, &c. Held, that the instrument operated as a deed, vesting the title, but postponing the possession, of the property. So also, in Adams v. Broughton, adm'r, 13 Ala. Rep. 731, it was held, that a voluntary deed, delivered to the grantee, conveying to him slaves, but reserving to the grantor a life estate, is operative at common law against purchasers, and subsequent creditors of the grantor, and is also valid as between the grantee, and the representatives of the grantor, notwithstanding his estate may be insolvent, and the grantor died in possession of the slaves. See also Jarman on Wills, 11, 13, n. e.; 3 Litt. Rep. 275; 9 Por. Rep. 650; 1 Ala. R.

52; 2 Ib. 648; Ib. 684; 4 Ib. 158; 7 Har. & Johns. Rep. 257; 2 Yerg. Rep. 582; 9 Gill & Johns. Rep. 77.

In giving the plaintiffs in error the benefit of the proviso, that the grantor was to retain the property during life, we do not wish to be considered as expressing any opinion upon the point, whether the proof showing the existence of such provision in the gift, was legitimate, and whether such contemporaneous understanding, was not merged in the written evidence which the grantor gave of his intention, viz., the deed which he executed and delivered. But we have considered the deed with this provision, merely to show that, granting all the donor insisted upon at the time, and shortly after its execution, the deed is valid as a gift, and not ambulatory as a will.

We may conclude this opinion, by remarking, that there is no evidence of any fraud or imposition, or undue influence of any description, practiced upon, or exercised over the grantor, previous to, or at the time of the execution and delivery of this deed.

That the father of the donees, some eight years after the execution of the deed, desired its registration should be kept a secret, cannot affect their title. The expressions used by the witnesses, when the case was previously here, "that the deed was his will," &c. are fully explained by them now to mean, (if used at all) that the provisions of the deed were in accordance with his wish, or desire. It is shown, that he executed the instrument when he was fully capable of understanding its import. That he did so after much deliberation, being cautioned, lest he should afterwards regret it. The deed was read to him, and he fully approved its provisions. Besides, he was advanced in years—had but one child, who was made one of the donees, and his habits of dissipation, rendered it entirely prudent for him to place the title of his property in such condition, as forbade his squandering it. The deed is an absolute conveyance to the donees, with warranty as to the title, and in the absence of evidence of fraud, mistake or surprise, it is perfectly clear, the title by it vested in the donees upon its delivery, and not being subject to revocation by the grantor, he could not, and *a fortiori*, his administrators cannot, divest the title thereby created.

We have not noticed the objections to the interrogatories, some of which are too leading, but excluding the proof elicited by such, enough remains to sustain, beyond all reasonable doubt, the chancellor's decree. Let the decree be affirmed.

MITCHELL, USE, &c. v. ROBERTSON.

1. In an action of ejectment, if the plaintiff shows a superior *legal* title, unless estopped from asserting it, he must recover, whatever may be the equities of the parties.
2. Where the purchase money, for land, is paid by *one* person, and the deed is taken in the name of *another*, the former acquires but an equitable estate, a sale of which, under execution at law, vests no title in the purchaser.
3. A judgment, in an action of trespass to try titles, is not conclusive, either upon the plaintiff, or the defendant, in a subsequent suit for the same land.

Error to the Circuit Court of Fayette. Before the Hon. George W. Stone.

THIS was an act of trespass, to try titles to a tract of land. The facts were agreed upon, and are as follows: The Bank of the State of Alabama, recovered a judgment for $400, in the county court of Tuscaloosa county, at its February term, 1839, against William Wilson and Fleming J. Thompson, on which execution issued, and was levied by the sheriff of Fayette county, on the 4th July, 1839, upon the land in controversy. The levy having been made too late to sell, before the return day of the execution, it was returned to the court whence it came, and a *venditioni exponas* was thereupon issued, commanding the sheriff to sell the land levied on, which he did on the first Monday in October, 1839, to the plaintiff, at the price of $661, and executed to him a deed for the same. The money with which the purchase was made, was the money of one Samuel Christman, and at

his request, the deed was made to the plaintiff, for the use of John M. Christman, the son of the said Samuel Christman. At the time of the sale, Thompson, one of the defendants in the judgment, had a *fee simple* title to the land, and it was agreed between him and Samuel Christman, that he, Thompson, should retain the possession of the land, and might redeem it by paying the purchase money, which he did, in a year or two afterwards. The agreement between Samuel Christman, and Thompson, was never reduced to writing. At the February term, 1839, of the county court of Fayette, a judgment was rendered for $989, in favor of Ross, Strang & Co., against Michael Christman and Samuel Christman, on which execution issued, and was on the 2d December, 1839, levied by the sheriff of Fayette on the said land. On the 6th January, 1840, the land was sold by the sheriff, and one Lindsay became the purchaser, and received a deed from the sheriff. In 1842, one R. H. Poe, to whom Lindsay had conveyed the land, instituted an action of trespass to try titles, against Thompson, who was then in possession, and recovered a judgment against him, under which he was evicted. Thompson defended this suit, and relied on the title of the plaintiff, Mitchell. Poe afterwards sold the land to the defendant in this suit. The annual rent of the land has been worth $75. On this state of facts, the court rendered judgment for the defendant, to which the plaintiff excepted, and now assigns it as error.

P. & J. L. Martin, for plaintiff in error.

DARGAN, J.—In an action of ejectment, if the plaintiff shows a superior legal title, and he is not estopped, in any manner from asserting it, he must recover; for a court of law can look to the legal title alone, without any regard to the equity of the parties.

It is admitted, that Thompson was seized *in fee* of the premises, and whilst he was so seized, a judgment at law, was recovered against him, by the State Bank, on which execution issued, and was levied on the land on the 4th day of July, 1839. This execution was returned, and a *venditioni exponas* issued, by which the sheriff was com-

manded to sell the land previously levied on by him. The land was sold under this process, and the plaintiff bid it off, but the money was paid by Samuel Christman, the father of John M. Christman, for whose use this suit is brought. The sheriff, under the directions of Samuel Christman, executed the deed to the plaintiff, for the use of John M. Christman. It was agreed, however, between Thompson and Samuel Christman, that Thompson might redeem the land, by paying to him the purchase money bid at the sale, but this agreement does not appear to have been reduced to writing. Thompson remained in possession of the land, and, in a year or two afterwards, re-paid to Samuel Christman, the amount bid at the sale.

It is evident, that the legal title passed out of Thompson, the tenant *in fee*, and by the sheriff's deed, became vested in the plaintiff. He must therefore recover, unless he has been divested of this title, or unless he is estopped, in a court of law, from asserting it.

The defendant claims title, under a judgment at law, rendered in favor of Ross, Strang & Co., against Samuel Christman, who paid the purchase money at the sale, under the execution against Thompson. The levy, under the execution in favor of Ross, Strang & Co., was made the 6th of December, 1839, and the sale took place in January, 1840. At this sale, one Wilson became the purchaser, who conveyed to Poe, under whom the defendant claims title.

Although the purchase money was paid by Samuel Christman, and a court of equity would subject the land to the payment of his debts, existing at the time, if they could not have been satisfied by process at law; yet it is very clear, that the legal title did not vest in him, by the sheriff's deed, executed to the plaintiff. The title to real property lies in grant, and cannot be acquired by purchase, unless by some written instrument, showing the title to be vested in the purchaser. The mere payment of the purchase money, without deed to the purchaser, gives him but an equitable, not a legal title.

The judgment at law, in favor of Ross, Strang & Co., against Samuel Christman, could not create a lien on this equity; and the sale by the sheriff in January, 1840, could

not convey to Wilson the legal title, because the defendant in execution, did not have a title at law. A sale by a sheriff, can only convey the legal title of the defendant in execution.

But it is contended, that the plaintiff is estopped from asserting his title at law, because Raza H. Poe, to whom Wilson conveyed, sued Thompson, the original owner, who defended himself, under the title of this plaintiff, but was evicted by a court of competent jurisdiction, in an action of trespass to try titles.

The action of trespass, to try titles, is given by statute as a substitute for the action of ejectment. A plaintiff may elect to bring the one, or the other. If he brings trespass to try titles, instead of ejectment, the judgment in this action will not conclude the title, either of plaintiff or defendant. No other or greater effect can be given to a judgment rendered in an action of trespass, to recover real property, than the law attaches to the action of ejectment. A trial and judgment in an action of ejectment, does not conclude the title, of either plaintiff or defendant, nor can a judgment, rendered in an action of trespass to try titles. See Camp v. Forrest et al. 13 Ala. 114.

We find, then, the legal title in the plaintiff, and he is not estopped from asserting it. We must, therefore, reverse the judgment rendered by the circuit court, and judgment must be here rendered for the plaintiff, that he recover the premises described in the declaration, and also the damages for the detention, which are admitted to be at the rate of $75 per annum, and which amount, in the whole, to $225.

BLACKSTONE v. THE STATE.

1. On the trial of an indictment for malicious mischief, under the fifth section of the fourth article of the penal code, the person whose property is injured, is not a competent witness for the State.

Error to the Circuit Court of Tuscaloosa. Before the Hon. T. A. Walker.

This was an indictment against plaintiff in error, under the statute, for malicious mischief, &c. The court, in opposition to the objection of the plaintiff, allowed the party whose property was injured, to be examined as a witness for the State, and considering it a novel question, certified as such to this court.

Porter, for the plaintiff in error.

The prisoner was illegally convicted, on the testimony of Brown, who was the owner of the property, alledged to have been injured. Brown stood as a party in interest; and the testimony of one thus situated, is not allowable. Tilly's Case, 1 Strange, 316; Rex v. Wylliams, 9 Barn. & Cres. 549.

The case of The State v. Truss, 9 Porter, 129, recognises the principle for which I contend, but placed the admissibility of the prosecutor in that case, on the ground that the penalty prescribed by the statute, was alternative. The jury had power to fine or imprison, and unless the first were done, the prosecutor was not benefited. In this case, however, there is no alternative. Fine and imprisonment are awarded; and the fine goes to the party injured. Penal Code, 417, § 5; 418, § 7.

Attorney General, for the State.

COLLIER, C. J.—In The State v. Truss, 9 Porter's R. 126, the defendant was indicted for malicious mischief, upon the statute which was in force previous to the adoption of the penal code. That statute authorized the jury, if they convicted the accused, to declare the measure of his punishment; *i. e.*, the extent of the fine, and the length of time for which he should be imprisoned, *and to inflict either one or both of these penalties*, in their discretion. The fine was directed to be paid to the party injured, and upon the question whether he was a competent witness for the State, this court was of opinion, that the rule which disqualifies a witness who has a direct interest in the event of the suit, applies as well

to criminal as civil cases. But it was said, if a conviction ensues, it does not necessarily follow, that the party injured will be benefited by this result, for the jury may inflict imprisonment, and omit the fine; as, therefore, no reward necessarily flows from the event of a conviction to the injured party, he is not within the rule. To show the existence of the rule, and its inapplicability to that case, the court cited Tully's Case, 1 Strange's Rep. 316; Rex v. Cole, 1 Esp. R. 169; King v. Wylliams, 9 B. & C. Rep. 549; Hawk. b. 2, ch. 46, § 135. See also 1 Greenl. Ev. § 362, 390, 403, 412 to 415.

Since the decision of the case in 9th Porter, the law, in respect to the offence with which the defendant is charged, has been modified. The fifth section of the penal code, (Clay's Dig. 417,) provides, that if any person shall unlawfully, wilfully and maliciously, kill, or disable, any horse, &c., he shall, on conviction, be fined in a sum equal to five fold the value of the property injured or destroyed, and shall be imprisoned in the county jail for a term not exceeding six months. It is provided by the seventh section of the same chapter, that the fine imposed for the offences embraced by the fifth, shall be paid to the party injured. Id. 418. This modification of the law, makes the imposition of a fine mandatory, and the necessary consequence of a verdict of guilty; and according to the decision, not only of our own court, but the other citations, the circuit court erred in permitting the party whose property was the subject of the malicious mischief, to testify. The judgment is consequently reversed, and the cause remanded, that it may be disposed of according to law.

HURST & SHIPP v. WEATHERS.

1. If an execution, on a judgment, against a sole defendant, issues, after his death, it is a nullity, and a sale under it, of land, which the defendant, in

his life time, had fraudulently conveyed to a third person, vests no title in the purchaser.

Error to the Circuit Court of Randolph. Before the Hon. Geo. W. Stone.

THIS was an action of trespass to try titles, instituted by plaintiffs, against defendant in error. The bill of exceptions discloses the following facts: In 1840, Hurst, Cox & Co. recovered a judgment against one McCollum, in the county court of Randolph, on which execution issued, and was returned no property. In 1842, said McCollum died, and in 1846, an *alias* execution issued on the judgment, and was levied on the land in controversy, then in possession of defendant, claiming under a fraudulent deed that McCollum had executed to him in his life time. At the sale by the sheriff, plaintiffs became the purchasers, and received the sheriff's deed for the land. The court charged the jury, that if they believed all the evidence, the plaintiffs were not entitled to recover. To this charge the plaintiffs excepted, and now assign it as error.

RICE & MORGAN, for plaintiffs in error.

1. In the absence of any fraudulent conveyance of land by a judgment debtor, before judgment rendered, and before his death, his land cannot be sold after his death, even under a judgment rendered in his life time. Hall v. Abercrombie, 6 Ala. Rep. 657.

2. But neither the reason of this rule, nor the rule itself, applies, when there is a fraudulent conveyance made by him before the plaintiff obtains judgment, and he dies after judgment rendered, and an execution issued. In such case, the fraudulent conveyance deprives the grantor and his heirs of all interest in the land, as against the fraudulent grantee, and it never can descend to the heirs of the grantors. No *scire facias* will lie against the heirs in such a case. Nor will *scire facias* lie against a fraudulent grantee. Where the fraudulent grantee takes, and holds the lands before and after judgment, it may be sold under the judgment, precisely as if

the judgment debtor had not died. Carter v. Castleberry, 5 Ala. Rep. 277; Harrison et al. v. Campbell, 6 Dana, 263.

3. If, in the case of such fraudulent conveyance, the creditor does not obtain a lien and judgment in the life time of the debtor, but only obtains judgment after his death, against his representative, then perhaps the creditor would have to go into chancery for relief against the fraudulent grantee. 6 Dana's Rep. 263. But where, in the life time of the debtor, the plaintiff obtains a judgment and lien on the land fraudulently conveyed, he may sell it after the debtor's death, and the purchaser at sheriff's sale may maintain ejectment, or trespass to try title, against the fraudulent grantee in possession. An attachment levied, and judgment obtained in the life time of a debtor, create a lien upon lands of that debtor, fraudulently conveyed to a third person, after the debt was created on which such attachment and judgment were founded. If the debtor lives, the lands can be sold under such judgment; if he dies, there is no reason why his death should operate to the prejudice of the creditor, or in favor of the fraudulent grantee. In other words, the death of the fraudulent grantor, does not take away from a judgment creditor, his right to sell the lands held by the fraudulent grantee. The levy of the attachment creates a lien, which cannot affect the heirs of the fraudulent grantor, and which is operative only against the fraudulent grantee, who can show his rights on the trial of this suit, as fully as he could have shown them if the debtor were now alive. Baldwin v. Leftwich, 12 Ala. Rep. 838.

4. The rule announced in Hall v. Abercrombie, 6 Ala. R. 657, rests upon a solid reason—that upon the death of the debtor, his lands descend to his heirs, and therefore cannot be sold without a direct proceeding against them, whose rights are to be affected. A fraudulent grantee cannot be reached at law, until after a sale, and sheriff's deed. It is admitted the fraudulent grantee, can be reached by a purchaser at sheriff's sale, by action of ejectment, provided the judgment debtor is alive. The fraudulent grantee, need not have notice of the sheriff's sale, or sheriff's deed. He is not affected, until the purchaser at sheriff's sale brings ejectment against him, and proves the fraud. And if the judgment

debtor is dead, why make the rule, or mode of proceeding against a fraudulent grantee, different from that which so justly obtains whilst the debtor lives?

L. E. Parsons and A. J. Walker, contra.

1. The fact that this judgment was obtained on an attachment, does not aid the sale. Land cannot be sold under a judgment, after the death of the defendant. Fitzpatrick v. Edgar, 5 Ala. 501; Withers v. Harris, 1 Salk. 600; Holloway v. Johnson, 7 Ala. 660; Erwin v. Dundas, 4 How. U. S. 58.

2. The same is the rule of law in respect to a *venditioni exponas*, to sell lands tested after the defendant in execution had died. Samuel v. Zachery, 4 Ire. 377.

3. A *sci. fa.* would have lain against the heirs and terretenants—*quere.*

CHILTON, J.—It is very certain, that the deed from McCollum, to the defendant, Weathers, being made to delay, hinder and defraud creditors, is void under the statute of frauds, as against a subsequent *bona fide* purchaser, even though such purchaser have notice of the prior deed; for though he has notice of it, he knows it to be fraudulent. Doe ex dem. &c. v. Manning, 9 East, 59; Carter v. Castleberry, 5 Ala. Rep. 279, and authorities there cited. And the purchaser may impeach such fraudulent conveyance, as well in law, as in equity. Ibid. But the point in the case before us is, are the plaintiffs so situated, as to enable them to raise the question? It is not sufficient, that the defendant can take nothing as against them, being creditors of the fraudulent vendor, by his corrupt bargain. They must recover upon the strength of their own title. Unless the plaintiffs acquired their title by their purchase under the execution, they cannot recover, however fraudulent, and void, the purchase by the defendant may be.

Had McCollum lived, the sale to the defendant being fraudulent as against the plaintiffs, would, as to their judgment, have passed no title, but it would have remained in McCollum, subject to be levied upon, and sold in satisfaction of the judgment against him. Carter v. Castleberry, *supra.*

As between McCollum and the defendant, the conveyance

was effectual and binding; it was only void as to creditors and *bona fide* purchasers for valuable consideration. And as McCollum's capacity to hold the title ceased by his death, the title at law must have vested absolutely in his vendee, or have descended to his heirs. It is insisted, that the title could not have descended upon the heirs, because they are concluded by the deed of the ancestor, and that the deed being void as to the plaintiffs, they have acquired the title by the execution sale, and sheriff's deed. Further, that as the judgment creditor could not have execution of the land by *scire facias* against the heirs, unless he is entitled to the remedy which he has pursued, the legal remedy has been lost, by reason of the fraudulent sale, which the law declares *utterly void*, so far as it affects the defrauded creditor.

In Harrison v. Campbell et al. 6 Dana's Rep. 263, 268, the debtor, one Davenport, had made a fraudulent conveyance of his real estate, and died. The creditor had sued the administrator, and obtained judgment. He also sued the heir, who upon the issue of *riens per descent*, defeated the action. He then filed his bill against the heir and fraudulent vendee, to have the land sold for the satisfaction of his judgment, having exhausted his legal remedy by return of "no property" on an execution. The court say that, "regarding the action, and judgment against the heir, as a proceeding against the land itself, and to determine its liability, this anomaly would be prevented. 1. The heir being without interest in the land, is a stranger to both the debt and the land, and is yet made the medium of ascertaining the debt, and giving judgment against the land. 2. The question of fraud in the ancestor's deed, on which the liability of the land depends, would be tried, when the only person interested in defending the title, is not, and cannot be, a party to the issue. 3. Consequently, the judgment against the land would not be conclusive, and when the creditor should attempt to avail himself of it by levying his execution, the person claiming it under the deed might contest its liability, and a new trial of the same matter, between different persons, and perhaps with a different result, would ensue." See also Rawls v. Graham, 4 Monr. 122, where it is decided, that the remedy of the creditor upon the land is not by descent, in

such case—that is, not against the heir, but against the fraudulent grantee of the intestate.

As the law exists in England, where the plaintiff in the judgment, after a return of *nihil*, upon a *scire facias* against the evecutor, may have such writ against the heir and terre-tenants, or against the terre-tenants alone, if the heir have been summoned, or there be no heir, or the heir have no land descended, the question as to the validity of the ancestor's conveyance to the tenant in possession, who might set it up in bar of the extent upon the writ of *elegit*, perhaps might properly be tried. Be this as it may, our statute only authorizes the writ of *scire facias* against the heirs and personal representative, in cases where *lands have descended* to the heirs, and the personal representative has failed to apply to the orphans' court for a sale of them. Clay's Dig. 197, § 27. With us, it is necessary in a proceeding by *scire facias*, to have execution of the land by sale, in satisfaction of the judgment, to show that it descended to the heir, whose title by the judgment upon the *scire facias*, and sale made in pursuance of it, becomes divested; while in England, the heir is proceeded against, not as heir, but as terre-tenant, and the land is not sold, but extended by the writ of *elegit*. 3 Rep. 12; Cro. Eliz. 872; Cro. Jac. 506; see also Fitzpatrick et al. v. Edgar, 5 Ala. Rep. 499. We arrive, therefore, at the conclusion, that the land, in this case, did not descend to the heir, and consequently, could not be made subject to the judgment by *scire facias*. And as by the death of McCollum before the issuance of the execution, the title in him was determined, it must be in the defendant, charged in equity with the payment of the plaintiff's judgment, by reason of the fraud in the conveyance.

In Burk's adm'r v. Jones 13 Ala. 167, we held that the lien of a judgment on lands, which attaches by virtue of the right which the judgment creditor has to have the lands extended by the writ of *elegit*, is destroyed by the death of the judgment debtor, and that upon the declaration of the insolvency of the estate, before a judgment on *scire facias*, subjecting the land, the estate became vested in the administrator for the purpose of paying all the debts *pro rata*. 2 Brock. Rep. 252; 2 Call's Rep. 125; 4 Hen. & Munf. 57; 1 Brock. R.

170. So that it is clear no right to sell the land upon the execution against McCollum, which issued after his death, could exist by virtue of any supposed lien of the judgment. The case of Abercrombie v. Hall, 6 Ala. R. 651, and Burk's adm'r v. Jones et al., *supra*, are in point, to show that an execution issued against a dead defendant is, as to his land, a nullity. See also, authorities on the brief of defendant's counsel, and Stewart v. Nuckles, at this term. From these authorities, it follows that the plaintiffs in error took no title by their sheriff's deed. The charge of the court below was consequently correct. We apprehend there can be no question as to the equitable remedy of the plaintiffs after they shall have exhausted their legal remedy, if the facts be as stated in the bill of exceptions. Let the judgment be affirmed.

DRAINE v. SMELSER & HENDERSON.

1. A court of law is competent to control the acts of its officer in the execution of its process, and, when satisfied, that a sale, made under it, is affected with fraud, or that the officer has been guilty of an irregularity to the injury of either party to the process, will ser aside such sale.
2. An agent, appointed by the Bank of the State of Alabama, or one of its Branches, under the statute of 1843, to execute the process, is the sheriff of the Bank, and is invested with the power and authority to perform the duties of his office by deputy.
3. A sale of land will not be set aside, because made under several executions at one and the same time.
4. Where land of the value of $800, is sold by an officer under legal process for $400, in the absence of fraud and irregularity in the officer, the sale will not be set aside for inadequacy of price.

Error to the County Court of Morgan. Before the Hon. William H. Campbell.

This was a motion by defendants in error, to set aside a

sale of land. The Branch Bank at Decatur, on the 21st of February, 1839, obtained three judgments in the County Court of Morgan; one numbered 1031, for $204 90, besides costs, against Smelser, Alexander and Henderson: another, numbered 1038, against Isbell, Boyce and Smelser, for about $160, besides costs; and the other, numbered 1785, against Smelser and Alexander, for $463 debt, and $113 20 damages. Executions from term to term, issued on said judgments, and on the 4th of November, 1844, were levied by the deputy agent of the bank, on a quarter section of land, as the property of Smelser, and also as the property of Henderson, which was sold on the 6th of January, 1845, at public outcry, under all three executions, and purchased by Thomas L. Draine, the plaintiff in error, for $400. Draine paid the purchase money, and received a deed from the agent of the bank. At the July term of the county court, 1846, Smelser and Henderson moved for a rule against the bank, the agent, and the purchaser Draine, to show cause why the sale should not be set aside; and they filed their affidavits, setting forth the recovery of the judgment, and the sale, &c. The grounds stated in these affidavits, why the sale should be set aside, are, that the land was sold under all three of the execntions, at once; that the judgment for about $160, No. 1038, had been paid before the sale, by previous levies and sales; that the *fi. fa.* issued on the last named judgment, No. 1785, was entitled to large credits, and although some were endorsed thereon, no mention of such credits was made by the deputy agent at the time of the sale: and that at the time of the sale, said land belonged wholly to Henderson, and was not strictly liable to said judgments against Isbell, Boyce and Smelser, and Smelser and Alexander, and that before the sale Henderson proposed to pay off the first judgment, No. 1031, for $204 90, in full, and requested a postponement of the sale, which the agent refused. The land is stated to be worth $800.

On these affidavits a rule was ordered against the bank, the agent of the bank, and the purchaser, to show cause why the sale should not be set aside. Notice being served upon the parties, the purchaser appeared, andresisted the motion, but the bank and the agent declined to take any part in it.

The affidavits of Henderson and Smelser were not contradicted, nor does it appear that any other proof was offered. The county court set aside the sale, and this action of the court is now assigned as error.

L. P. WALKER, for plaintiff in error.

1. The power of a court to set aside a sale made under its process, is confined to cases where there has been an *improper* execution of a *fi. fa.* Where the sheriff has committed some irregularity, mistake or fraud, or where the purchaser has been guilty of fraud. It would seem from the cases that this is the limit of the power, and that it does not extend to cases where the purchaser has committed no fraud, and the sheriff has been guilty of no mistake or irregularity. 9 Port. 679; 2 Ala. 682; 4 ib. 321, 402 6 ib. 221; 10 ib. 293; 13 ib. 289.

2. If it is true that it is only for some irregularity, or mistake or fraud, in the *mode* of *executing* a *fi. fa.*, that a sale will be set aside—then this is not the remedy when the judgment has been satisfied before the levy, or before the issuance of the execution, as the affidavits here state. The proper course would be *injunction* or *supersedeas.* As to *supersedeas*, see 4 Ala. 572; 7 ib. 469; 13 ib. 469; 8 ib. 848; 7 ib. 568; 10 ib. 281; 5 ib. 629. But see 2 U. S. Dig. 355, § 919; 3 Dana's Rep. 95.

3. The only *irregularity* in the *mode* of *executing* the *fi. fas.*, worth notice, mentioned in the affidavits or the rule to show cause, is that the land was sold under several levies at the same time; whereas it should have been separate under each. Does not the language of the court, 13 Ala. 520, at the top, (Powell v. The Governor,) seem to recognize that a sheriff may sell at the same time under several executions? See also, 4 Ala. 93.

4. The inadequacy of price mentioned in the affidavit, is no cause for setting aside the sale. 13 Ala. 516: 2 U. S. Dig. 354, § 900.

5. The quashing of an execution for irregularity, does not of itself, set aside a sale of land made under it. For, should the sale be set aside, if the purchaser, without notice of the

irregularity, has paid his money, and obtained a deed, the *onus* of proving such notice, lies on the party making the motion. Chambers v. Stone & Pope, 9 Ala. Rep. 261.

6. The affidavits of the defendants in execution are not competent proof to authorize a court to set aside a sale. A motion of this sort, is a *suit*, and the showing should be made by the testimony of witnesses, subject to cross examination. The affidavits serve only as a foundation for the rule to show cause. Before the order is made, further proof should be required.

7. That Smelser had no title to the land, is no ground for a motion to set aside the sale. The proper *forum*, in such a case, is a court of equity. 5 Cowen, 38.

T. M. Peters, contra.

1. The bank agent was appointed to perform the duties of sheriff for the bank, and the rules applicable to sales by sheriffs, are applicable to bank agents' sales under execution. 1 Clay's Dig. 118, § 86.

2. It follows then, that sales by bank agents would be set aside for like irregularities that a sheriff's sale would be set aside. Like reason doth make like law. Co. Litt. 10, a. Sheriff's sales will be set aside, and the deed of the purchaser declared void, if the sheriff is guilty of a *mistake*, *irregularity* or *fraud*, to the prejudice (injury) of either party to the *fi. fa.*. or a third person: and this though a deed has been executed to the purchaser, at any time before the purchaser gets possession. Mobile Cotton Press v. Moore & Magee, 9 Por. Rep, 679 ; 6 Ala. 221 ; Abercrombie et al. v. Conner, 10 ib. 293 ; 9 Port. 679.

3. In such cases, the proceeding is by motion to the court, whence the *fi. fa.* has issued, made by the party complaining of injury. This is founded on and supported by the affidavits of the party making the motion, and others acquainted with the facts. These affidavits may be contradicted by counter affidavits on the other side ; and the affidavits on both sides, and by both parties, will be heard in their own favor. Such affidavits may be sworn before the judge of the court ; before the clerk in open court ; before any foreign judge or justice of the peace, or before a commissioner ap-

pointed by the court. Faulkner et al. v. Chandler, 11 Ala. 725; 9 Port. 679; 2 Arch. Pr. 302; 2 Arch. Pr. 32; also "motions" in Chitty's Gen. Pr., Tidd's Pr., Dunlap's Pr.

4. But should the court think differently on this point, then the sale was properly set aside, because it was irregular; 1. because the land sold is proven to have belonged to Henderson. The judgment against him was for about $200. This he proposed to pay in cash on the day of sale, to save his land from sacrifice. This it was his right to do, or to substitute other property. Allen's Sheriff, 169; 1 Archb. Pr. 296; 5 Cowen's Rep. 248; 2 Lev. Rep. 203; Bennett v. Bass et al. 10 Ala. Rep. 951; Allen's Shff. 197, parag. 2; Clay's Dig. 205, § 18. This the officer refused to allow, and land worth $800 was sacrificed for $400. This was a very great *injury* to Henderson.

5. Again—In the second place, the land sold was a *quarter section*, containing 160 acres; and it could have been divided into *two* parcels of 80 acres each, or into *four* parcels of 40 acres each—such divisions being common and usual in the sale of lands by the general government to the citizen. The deputy should therefore have sold in *parcels*, and not *en masse*, as he did. Such sales are not to be tolerated. Allen Shff. 188; 1 John. Ch. Rep. 502; 2 Cowen's Rep. 139; 13 John. R. 132; Rawley v. Brown, 1 Binney's Rep. 61; Groff v. Jones, 6 Wend. R. 522; Ryerson v. Nicholson, 2 Yeates' R. 516; Nesbit v. Dallam, 7 Gill & John. R. 512; 9 Port. 679; 14 John. Rep. 352; 17 ib. 116; 8 ib. 333; Allen's Shff. 171; Powell v. Governor, &c., 9 Ala. Rep. 36, et seq.

6. The lands being shown to belong to Henderson, it was irregular and oppressive to have sold *more* of his land than was necessary to have paid his debt and costs, which was about $200. The sheriff makes himself a trespasser, if he unnecessarily makes an excessive levy and sale; and at common law, if he *wantonly* levied and sold more than enough to pay the judgment and costs, and the defendant was greatly injured and prejudiced thereby, besides being liable *civilly*, in an action for damages, to the defendant, the officer was also indictable for misconduct in office, which was a misdemeanor. In such cases the sale would be set aside. Robets v. Beeson, 4 Port. 164; Carlisle v. Carlisle, 7 Marsh.

Rep. 625; Knight v. Applegote's heirs, 3 Monr. Rep. 388; 9 Port. 679; Smith v. Locke, 4 Ala. 288; Allen's Shff. 171, ¶ 2; 2 Bac. Abr. 739; Sayer's case, Cro. Jac. 420; 6 Bac. Abr. 176. n. a; Leonard's Rep. 92, *Temp.* Elizabeth; 2 Ld. Raym. Rep. 1189; Salk. Rep. 381; Allen's Shff. 31, 199; Watson's Shff. 199; 3 Camp. R. 521; 5 Hill's R. 521.

7. If there are but *few* or no bidder's present able to buy for a fair price, it is the duty of the sheriff or officer selling, to postpone the sale, and return the process "that the goods remain in his hands unsold for want of buyers." So, in the present case, by selling *en masse*, instead of by *parcels*, all those who had *less* sumsthan $400, would have been excluded for, as the sale is for cash, the bidder who has not money enough to pay his bid, or no money at all, need not be noticed. And thus, in truth and effect, there was but *one* bidder present when this sale was made, as those with *one*, *two* or *three* hundred dollars were excluded, who might have bid for the parcels had the sale been properly conducted. Allen's Shff. 172; 3 Camp. R. 521; 5 Hill's R. 571; 9 Ala. 36; 7 ib. 645, 650; 1 Hill's Rep. 118; Allen, 175, 190; 2 Cowen's Rep. 139.

8· The sale under three *fi. fas.* at once, was irregular, when the parties to the *fi. fas.* are not the same. The sale under one *fi. fa.* as fully divests the defendant's right, as a sale under a greater number. Allen's Shff. 151; 10 Ala. 951; 4 T. R. 633, 648; 7 ib. 177; 3 M. & Selw. Rep. 175. Each defendant is entitled to have his *own* property sold for his *own* benefit, *separately* from a sale of any other's, that he may know specifically and precisely what it has brought, so that he may get the proper credit for the same. This cannot be done when the property is sold under several *fi. fas.* against several defendants at the same time, as was done in this instance. Such *multifarious* sales tend to confuse the title of the purchaser, and cloud it. They should not therefore be allowed, and the court did not err in setting this aside.—Clay's Dig, 206, § 24; Allen's Shff. 171, 176; 3 Cowen, 334; 7 Port. 67; 4 Ala. 288.

DARGAN, J.—A court of law is fully competent to control the acts of their officers, and to set aside sales made by

them, by virtue of legal process, when there has been fraud in the sale, or the officer guilty of such irregularity, as is oppressive, and injurious to the rights of either plaintiff or defendant. 9 Porter, 682, and the cases there cited. But whether the court will interfere to set aside a sale, must always depend on the facts of each particular case, and the party moving to have it set aside, must show either fraud, or such irregularity in conducting the sale, together with injury to the rights of the party, as will satisfy the court that the sale should not be made.

The first ground relied on, to show that the sale in this case ought to be set aside, is, that the land was sold by a deputy of the bank agent. It is contended, that although the agents of the bank, are clothed with the same powers in the execution of process in favor of the bank, that sheriffs possess by law, yet they are not authorized to appoint deputies, or to perform the duties required of them by another. We cannot give so limited a construction to the act, authorizing the State Bank, and its branches, to appoint agents to execute process. The act declares, that the agents shall have the same powers, shall be entitled to the same fees, and shall observe the same regulations, as the existing laws prescribe to sheriffs. We think that this statute intends to invest the agents of the bank, with all the powers, rights, and authority, in reference to the execution of process in favor of the bank, that sheriffs possess, either by common law, or by our statutes. In other words, the agent, is the sheriff for the bank, invested fully with all his authority, and may perform the duties of his office by deputy.

2. Nor can we yield our assent to the argument, that the sale should be set aside, because the land was sold under three executions, instead of selling under one alone. We do not perceive any reason, why land may not be advertised, and sold to pay different judgments, nor how the title of the purchaser will be embarrassed, by selling to satisfy two, or more executions. How can the title be defective, which the purchaser obtains by a sale under two executions at the same time, when a sale under either, would be valid? Or why should the land bring less, or how is the defendant injured by such a sale? If it is sold under one alone, the purchase

money must be applied to all, and we cannot see that benefit would accrue to the defendant, or plaintiff, by selling under one, or injury, by selling under all.

3. It is however contended, that the sale should be set aside, for inadequacy of price. The affidavit of the defendants, which appears to have been the only evidence on which the court acted, states, that the land was worth eight hundred dollars, but brought only four hundred.

In the case of the Mobile Cotton Press v. Moore & Magee, 9 Ala., 682, it is said, that inadequacy of price, within itself, is not a sufficient ground to set aside a sale of land. See also, Hart v. Blight, 3 Monroe, 273; 1 Lit. Select Cases, 256. But coupled with other circumstances, it may be. I will not lay down the rule so broad, that mere inadequacy of price may not afford, within itself, such evidences as would superinduce the belief of fraud; or such gross neglect, in the execution of the process as would require the court to interfere, and set aside the sale. But I do not think, that the price at which the land was sold, in this case, can afford any ground, that will justify a court, in setting it aside. Nor can we perceive that there are any circumstances connected with the sale, which, in conjunction with the price at which it was sold, will warrant us in setting it aside. The land had been levied on for two months previous to the sale; no steps were taken to pay the debts, or to stop the executions. The offer to pay one execution, if the agent would postpone the sale, created no legal obligation on him to do it, and indeed he might have subjected himself to legal liability had he complied.

But, it is contended, that the offer of Henderson to pay up the judgment against him, is a fact, or circumstance that ought to set the sale aside. If it had been shown, that the land was not legally liable to all the judgments, we should be disposed, indeed compelled, to hold this sufficient; but it is not stated, that the land was not liable for the payment of all the judgments. Indeed, we are led to the conclusion, from reading the affidavits, that all the judgments were *liens* on the land, and if Henderson was the owner, at the time of the sale, he held in subordination to those *liens*.

The affidavits on which the rule was granted, state, that

the affiants are informed, and believe, that the judgment for $204 90, was fully paid before the sale. If this fact was so, of which however, we have no other proof than that contained in the affidavit of the parties, it could not affect the sale. The two other judgments remained unpaid, with some credits on one, the amount of which we are not advised. They were valid, and bound the land. It was duly advertised, and no act was done by the agent of the bank, the purchaser, or the plaintiff in execution, that was calculated to prevent the land from bringing its full value. The price at which it was sold, affords no evidence within itself, that will warrant us in divesting the purchaser of such title as he may have acquired; nor can we find any circumstance connected with the sale, that requires us to set it aside.

The judgment of the county court must be reversed.

HALL ET ALS. V. THE STATE.

1. A recognizance, by which the recognizors stipulate that the principal shall appear and answer to a charge of conspiracy, is sufficient, although it does not designate in the terms of the indictment, the particular act which he conspired to do.
2. A judgment *nisi*, on a forfeited recognizance, which does not specify the charge, that the principal recognizor was called to answer, is insufficient to support a judgment final.
3. A *scire facias*, on a forfeited recognizance, is a mere notice to the recognizors to show cause why the judgment *nisi* should not be made final, and a discontinuance as to any one or more of the parties, will not operate a discontinuance as to all.
4. Where two writs of *scire facias*, on a forfeited recognizance, are returned, *nihil*, by the sheriff of the county, in which the recognizance was entered into, it is equivalent to a service; but two such returns, by the sheriff of a different county, will not have the same effect.
5. A recognizance, taken by the court, in which the indictment is found, simultaneously with an order changing the venue to another county, and which is conditioned for the appearance of the accused, to answer the

charge, at the ensuing circuit court of the county, to which the cause is transferred, is not liable to objection on that account.

Error to the Circuit Court of Macon. Before the Hon. G. W. Stone.

This was a proceeding on a forfeited recognizance, at the instance of the State, against plaintiffs in error. A true bill was found against Hall, and another, at the fall term, 1841, of the circuit court of Montgomery county, for a conspiracy to cheat, swindle, and defraud, the Branch of the Bank of the State of Alabama at Montgomery, of goods and chattels, and moneys, &c. At the spring term, 1842, the venue was changed, and the cause transferred to Macon county, and at the same term of Montgomery circuit court, at which the change of venue was ordered, Hall and others, his securities, entered into recognizance in the sum of $1,000, conditioned, "that the said Dixon Hall appear at the next term of the circuit court, to be holden for Macon county, Alabama, to answer to a bill of indictment pending in said court against him for a conspiracy, and there to remain, from day to day, and from term to term, until discharged by due course of law." At the spring term, 1844, of the circuit court of Macon, a judgment *nisi* was entered against said Hall and his securities, having the word "conspiracy," in the caption of the entry, and which recites, that "the said Dixon Hall, being solemnly called to come into court and answer to the indictment in this case, as he is by his recognizance this day bound to do, comes not, but makes default." Writs of *scire facias* issued to the two succeeding terms of the court, each of which was returned by the sheriff of Autauga county, in which the said Hall and his securities lived, executed as to one of the securities, and not found, as to the remainder of the defendants. At the court following the return of the second *scire facias*, the judgment *nisi* was made absolute. Several assignments of error are now made, all of which sufficiently appear by the opinion delivered.

Rice & Morgan, for plaintiffs in error.

1. Final judgment on a forfeited recognizance, cannot be

entered against such of the recognizors as are not served, where the original and *alias* writs of *scire facias* are returned not found by "the sheriff of Autauga county, and the recognizance was entered into in a different county. The return must be made by "the proper officer of the county in which the forfeited recognizance shall have been entered into." Clay's Dig. 442, § 25, proviso of that section; McCurry v. Hooper, 12 Ala. Rep. 823, as to notice to parties.

2. The whole proceedings on the recognizance are discontinued, because there have been no legal proceedings on it for many terms, and because it has been improperly disposed of. A discontinuance as to one obligor, is a discontinuance as to all. Givens v. Robbins and Painter, 5 Ala. R. 676.

3. The judgment *nisi*, does not show what offence the principal was called to answer, or that he was called to answer any offence. This is an incurable defect. Howie et al. v. The State, 1 Ala. R. 113; Badger v. The State, 5 Ib. 21; State v. Turnipseed, 6 Ib. 664.

4. Each motion, demurrer and plea, filed by Dixon Hall, should have been sustained.

5. The recognizance is not sufficient to sustain any summary judgment, or authorize a forfeiture. It mentions no legal offence. "Conspiracy" does not, *per se*, import a criminal and indictable offence under our law. But if it did, the recognizance is void for uncertainty. State v. Turnipseed, 6 Ala. R. 664.

6. The recognizance is void, because it was taken by the circuit court of Montgomery, in a cause shown by the record to be pending in the county of Macon. After the change of venue, the circuit court of Montgomery had no power to take any recognizance, nor to do any other act in that cause, as its jurisdiction ceased with the change of venue. Boynton v. Foster, 7 Metc. Rep. 415. See Colt v. Partridge, 7 Metc. Rep. 573, where the statute of Massachusetts is set forth, on which the decision is based in Boynton v. Foster.

7. *Sci. fa.* executed on Thomas *W.* Hall, will not sustain a judgment final against Thomas *H.* Hall.

All the points presented by the record, are relied on by each plaintiff in error.

8. The final judgment is an improper and illegal disposition of the cause as to one or more of the plaintiffs in error, and is therefore a discontinuance as to all. Givens v. Robbins, 5 Ala. R. 676; Greer v. McGehee, 3 Porter, 398.

Attorney General, for the State.

1. There is no error in the manner in which the court below disposed of the multitudinous motions, demurrers and pleas, of plaintiff in error. The case is headed, "The State v. Dixon Hall and William Kirk—conspiracy," and the judgment *nisi* and *scire facias* recites that "Dixon Hall being called to answer the indictment in this case," &c. refers to the State v. him for conspiracy. There is a substantial conformity of the judgment to the recognizance, and the former need only recite, that defendant was called to answer the offence which the recognizors stipulated he should answer—the recognizance need not be recited. Badger and Clayton v. State, 5 Ala. R. 21; Howie and Morrison v. State, 1 Ib. 113; Farr v. State, 6 Ib. 794.

2. The word conspiracy sufficiently indicates the offence with which the party was charged, and is technical, as much so as assult and battery.

3. There was no discontinuance, until the party was legally discharged by having that fact spread upon the record, or entering a *nolle prosequi*, as the undertaking of the conusor was to appear from term to term, until discharged; and it is not necessary that any disposition appears to have been made of the case. Goodwin v. The Governor, 1 S. & P. 468; Kennedy v. Jackson, Minor's R. 137; Greer v. McGehee, 3 Porter, 398.

4. The defendant first entered into recognizance in Autauga county, and that was the county from which the original and *alias fi. fa.* should have been returned not found. The proper county is the county where arrested. Embree v. Lamb, 2 Yerg. 291; Miller v. White, 6 Ib. 269, 272.

COLLIER, C. J.—1. In Browder v. The State, 9 Ala. Rep. 58, the recognizance stipulated that the accused should appear "and answer to a charge of the State against him for resisting process," and it was held to be sufficiently indicative

of the offence, although the statute makes the offence consist in "knowingly or wilfully resisting or opposing any officer of this State in serving, or attempting to serve, or execute, any legal writ, or process whatsoever." So, in Hall et al. v. The State, 9 Ala. Rep. 827, the recognizors stipulated that the accused should appear and answer a charge to be exhibited against him, on behalf of the State, "for carrying concealed weapons;" and the recognizance was adjudged sufficient. The statute on which the prosecution was instituted, is as follows: "Every one, who shall hereafter carry concealed about his person, a bowie knife, or knife or instrument of like kind or description, by whatever name called, dirk, or any other deadly weapon," &c.; unless such person shall be threatened with, or have good cause to apprehend an attack, or be traveling or setting out on a journey, shall on conviction," &c. See Clay's Dig. 436, § 4. We cited, with approbation, The People v. Blackman, 17 Wend. Rep. 255, in which it was held, that a recognizance was valid, if the offence be charged *substantially*, though not in the words of the statute creating it. The court said, "it is not necessary to set forth the offence in the *warrant*, *mittimus* or *recognizance*, with all the particularity, or detail required in an indictment. *Mr. Chitty* lays down the doctrine, that it is not necessary to set out the charge or offence at all, in the warrant to arrest; and he seems to be fully supported by authority." The recognizance in the case before us, stipulates for the appearance of the accused, at the term of the circuit court next succeeding the time when it was entered into, "to be holden for Macon county, Alabama, to answer to a bill of indictment, pending in said court against him for a conspiracy, and there to remain from day to day, and from term to term, until discharged by due course of law." The indictment charges that the principal recognizor, and another person, (who has not been arrested,) with the intention "to cheat, swindle and defraud, the Branch of the Bank of the State of Alabama at Montgomery, of goods and chattels, and moneys, on," &c., "in the State aforesaid, unlawfully and wickedly did conspire, contrive, confederate and agree together, between and among themselves," &c. True, it would have been more formal, if the recognizance had recited the partic-

ular conspiracy with which the accused was charged. But this particularity was not observed in the cases cited. In the first, the process to which resistance was alledged to have been made, was not described, so as to identify it; and in the other, the character of the concealed weapon which was worn, was not stated; yet in both cases, the recognizance was considered sufficiently descriptive of the offence. The recognizance in the present case is equally precise—it designates the charge by the general term by which it is known; and we are constrained by the influence of authority, from which we have no desire to depart, to hold that it is not objectionable for generality.

2. On the margin of the judgment *nisi*, the case is thus stated: "The State v. Dixon Hall and William Kirk—conspiracy." The entry states that Dixon Hall was "called to come into court and answer to the indictment in this case, as he is by his recognizance this day bound to do, came not, but made default. It is therefore considered," &c. It is possible the note upon the margin is a sufficient warrant for a judgment *nunc pro tunc*, but it cannot of itself cure the defectiveness of the judgment as it now stands. Such a memorandum constitutes no part of the entry, and is not adopted as the act of the court; but is usually made by the clerk, for the convenience of reference. Catlin, Peeples & Co. v. Gilder's ex'rs, 3 Ala. Rep. 536. Placing this note out of view, as we must, and the judgment is a mere nullity, in not affirming that the accused was called to answer the charge to which himself and sureties had stipulated he should respond. Howie and Morrison v. The State, 1 Ala. Rep. 113; Badger and Clayton v. The State, 5 Ib. 21; Lindsay and Atkinson v. The State, June term, 1848.

3. In Robinson and another v. The State, 5 Ala. Rep. 706, we said that the proceeding by *scire facias* on a forfeited recognizance, is not governed by the rules which apply to actions prosecuted by individuals. That although the statute declared that every joint judgment, bond, &c. should in legal effect be joint and several, and process might be sued out against any one or more of the parties liable thereon, yet if all were sued and served with process, the action could not be discontinued as to any one, without putting an end to the

entire case. *We said further*, that "this enactment has never been considered applicable to a recognizance of bail in a criminal case, whether joint or several, nor has the more stringent rule of the common law, which regulates proceedings on contracts between individuals, been held to inhibit the prosecution of a *scire facias*, and the recovery of a judgment against any one or more of several recognizors. The *scire facias* is regarded as a mere notice to the parties to the recognizance, to show cause why they should not be subjected to the payment of its penalty: the State may call upon such of the parties as its prosecuting officer may select, to show cause, and allow the proceedings to be silently discontinued as to the others." See Lyon v. the State Bank, 1 Stew. Rep. 442; Bondurant et al. v. Woods and Abbott, 1 Ala. Rep. N. S. 543. Here is a sufficient answer to the argument, that a discontinuance as to one of the recognizors, operates to discontinue the proceeding *in toto*.

4. The 25th section of the 8th chapter of the penal code enacts, that "where an original and *alias* writ of *scire facias*, issued upon a judgment *nisi*, rendered at the instance of the State upon a forfeited recognizance, shall be returned 'not found,' such return shall be equivalent to personal service of the process, and authorize the court in which the judgment *nisi* was rendered, to make the same absolute: *Provided*, that such writs shall have been returned by the proper officer of the county, in which the forfeited recognizance shall have been entered into or acknowledged." Clay's Dig. 442. This enactment is too explicit to afford ground for controversy. Here, the indictment was found in Montgomery county, and there the recognizance was entered into. It is clear, then, the return of "not found" to the original and *alias sci. fa.* as to some of the recognizors, did not, as against them, authorize the rendition of a final judgment. These writs were placed in the hands of the sheriff of Autauga, who returned them. To have entitled the State to proceed without the execution of process, it was indispensable that it should have complied with the *proviso* to the section cited, by causing the returns to have been made by the sheriff of Montgomery.

If the indictment is still pending, it will be entirely com-

petent for the court to perfect the judgment against all the recognizors; or upon a formal requisition being made for the appearance of the accused, or for his sureties to bring him into court, to enter a judgment *nisi*, anew, if default is made. The recognizance stipulates for the appearance of the accused from *day to day, and from term to term*, and thus their obligation is still operative, not in any manner impaired by the irregular proceedings that have been had.

5. The recognizance is not objectionable, because it was taken by the circuit court of Montgomery simultaneously with the order by which the venue was changed to Macon. In fact, there is nothing to indicate that it was not then entered into, unless it be the stipulation on its face to appear and answer to an indictment *pending* in the circuit court of Macon. When literally interpreted, this language implies that the transfer had already taken place, but judging from the inaccuracies in the record, it is altogether probable that the clerk who entered the recognizance, supposed that the indictment was actually *pending* in the court, to which it was directed to be transferred, *eo instanti* the order was made. Be this as it may, it is perfectly certain that the recognizance was entered into at the same term the change of venue was ordered, and during that time the cause, with all its incidents, was under the control of the circuit court of Montgomery, unless the papers had actually been transmitted. But even after the removal of the cause, it would have been competent for that court, and perhaps, under some circumstances, a duty, to have taken a recognizance. Suppose the accused had not been ready with his sureties, or been confined in jail for his inability to procure them when the change of *venue* was ordered, it would be clearly competent to have accepted his bail, afterwards, without imposing upon him the necessity of resorting to a *habeas corpus* to be relieved from imprisonment. There was certainly no defect of power in the court taking the recognizance, if we are to form an opinion from the record before us. It is wholly unnecessary to consider the other points made by the plaintiffs in error. The judgment of the circuit court is reversed, and the cause remanded.

POTIER & McCOY v. BARCLAY AND HUSBAND.

1. It is error to decree to a widow a sum certain, in lieu of dower, to be raised by sale of the estate to which the dower attaches. The decree should be for the payment annually of the sum ascertained to be the annual value of the dower interest.
2. Misrecitals in a supplemental, of the allegations in an original bill, can not change the character of the relief sought by the latter. The two must be taken together, as constituting but one bill.
3. A marriage solemnized in accordance with our stntute, between parties capable of contracting, with their free, full and mutual consent, is complete, without cohabitation, and entitles them respectively, to all the rights incident to that relation.
4. When a marriage is contracted and solemnized in good faith, the subsequent refusal of the wife to live and cohabit with the husband, will not work a forfeiture of her right to dower, at his death, in the lands, of which he was seized during the coverture.
5. Dower is a legal right, and whether application is made for its allotment to a court of equity or a court of law, the principle of decision is the same. When the right is consummated by marriage, seizin, and the death of the husband, the statute makes it imperative on the court to allot it.
6. When a widow files her bill to have dower allotted her, and during the pendency of the suit, intermarries, it is not error to make her husband a co-complainant.
7. It is error to admit in evidence the copy of a deed, without accounting for the absence of the original, or giving notice to the adverse party to produce it.
8. A person authorised by a commission to take the testimony of a witness is *pro hac vice* an officer of the court, as such, is invested with the authority to swear the witness.
9. An objection to a deposition, that the commissioner, who was not a judicial officer, swore the witness, if there was any force in it, comes too late, when made for the first time at the trial.
10, There is no error in refusing to suppress a deposition, because the commissioner who took it, is a partner of the solicitor of the party in whose behalf it was taken, when it appears that said commissioner is not retained in the cause, and has never had any interest in it.

Error to the Court of Chancery of the 1st District. Before the Hon. A. Crenshaw, Chancellor.

This bill was filed by Josephine Barclay against the plaintiffs in error, for dower in the real estate of which Henry A. Barclay, her late husband, was seized, during the coverture, or at the time of his death. It alledges her intermarriage with him on the 24th December, 1842, and his death on the 31st October, 1843: his seisen, during the coverture, of and in a considerable real estate; the character and description of which she is ignorant, except as to a lot of ground, and improvements thereon, in the city of Mobile, which is particularly described in the bill; and the execution of a last will and testament by him prior to his death, by which he made certain dispositions of his property, and appointed Potier and McCoy his executors. It further alledges, that said Potier and McCoy hove not, and do not intend to probate said will: that she is ignorant of its provisions, and has no means of learning what they are, but by its production; and that she has, neither during her said late husband's life, nor since, parted with her right of dower in any of the real estate of which he was seized. The prayer of the bill is, that said Potier and McCoy, and the children of said Henry A. Barclay, by a former marriage, and who are named in the bill, be made parties, and be required to answer; that said Potier and McCoy be compelled to produce the said will; to discover the real estate of which, said Henry A. was seized and possessed at the time of his death, the rents they have received therefrom, and what are now due: that she be decreed her dower in the premises particularly mentioned in the bill, and any other of which said Henry A. died possessed, &c., and for general relief,

On the 19th August, 1845, the said Josephine filed her supplemental bill, in which, among other things, she alledges her intermarriage with John W. Reviere, since the filing of her original bill. The probate of the will of said Henry A. Barclay; the qualification of said McCoy as executor; the refusal of said Potier to qualify as such; and the appointment and qualification of said Potier as guardian of the infant children of said Henry A., &c.

On the 2d Monday in Dec. 1845, said Potier was appointed by the chancellor, guardian, *ad litem*, of the infant defendants. Each of the defendants answered, denying that said

Henry A. died seized of any real estate whatever, and admiting the solemnization of the marriage contract, but insisting that it was never consummated by co-habitation: that within a few days after the marriage said Josephine abandoned the house of the said Henry A. Barclay, and ever afterward refused to live with him, or to acknowledge him as her husband, &c.

Testimony was taken by each party. At the hearing, the plaintiffs in error objected to, and moved for the suppression of certain depositions taken by the defendants in error, on the grounds, 1st. That the witnesses were sworn by the commissioner, and not by a judicial officer. 2d. That the commissioner was a partner of the solicitor for the said defendants in error. Each objection was overruled, it having been made to appear to the court that the bill was filed before the formation of the partnership between said solicitor and the commissioner, aud that the latter had no interest in the case. The defendant in error offered and read to the court these depositions, which tended to show possession of the premises in question, in his life-time, by said Henry A. Barclay, and the copy of a deed from C. J. Mansony and wife to said Henry A., for said premises, dated the 23d day of November, 1832, to which copy deed the plaintiffs in error objected, but their objection was overruled.

The plaintiffs in error read in evidence a deed of gift from said Henry A. Barclay to said McCoy, in trust, for the children of said Henry A., of said premises, dated the 25th October, 1843, and depositions of witnesses, showing that on the third day after the marriage, the said Josephine abandoned the said Henry A., never returned to his house, refused to acknowledge him as her husband, and that they had never cohabited as man and wife.

The chancellor directed a reference to the master, to ascertain the rents and profits that had accrued since the death of the said Henry A., and whether dower can be assigned in the premises without manifest injury to the parties in interest, and if not what sum of money should be allowed in lieu of dower. On the coming in of the master's report, which stated that dower could not be assigned out of the premises,

without manifest injury to the parties in interest, and that one-sixth of the value thereof was a fair allowance in lieu of dower, &c. The chancellor confirmed the report, and rendered a final decree in favor of defendant's in error for one-sixth part of the value of the premises, to be raised, if not paid, by a sale thereof.

The said decree, and the several rulings of the chancellor, together with the making of the said John W. Reviere, the said Josephine's present husband, a party, are now assigned as error.

Stewart, for plaintiffs in error.

1. The decree must necessarily be reversed, because it orders a sale of the property to raise the dower portion. This cannot be done, and the point is settled in this court. 11 Ala. 20.

2. The case made by the bill, and the case made by the proof, are variant; and the bill was not amended so as to conform to the proof, so the decree cannot be rendered. The issue made by the defendants was sustained. It was "that Barclay did not die seized of any land"—and so was the proof. He conveyed it by deed before he died.

3. The answer of the infants put every thing in issue: the complainants therefore were bound to prove *seizin in Barclay.* To do this, they offered a copy of a deed, without producing the original, or accounting for its absence, or giving notice to produce it. So the deed must be excluded in considering the case here. It was objected to below. The parol proof of ownership was also objected. There was then no sufficient proof of the seizin, and the admissions of the adult defendants don't bind them.

4. This brings us to the main question,—Whether the widow could claim dower in a case where the marriage ceremony was performed, but stopped there?—where the wife refused to consummate the marriage, deserted her husband, and refnsed to perform the contract on her part, *in toto.* The case is an entire refusal to perform any part of the contract. The *espousal* and *solemnization* took place, but nothing more. We say she can claim no dower in such case. The question is entirely open in this State, and is to be decided

on principle. We may consider—1. Whether the marriage was sufficiently completed, so as to create the right of dower; and 2. If it was, can the claim be enforced, where the party claiming utterly refuses to perform the contract on her part? And this, in a court of equity.

Was the marriage sufficiently complete? We have here no marriage acts which interfere. What is therefore marriage. It may be said to consist of three things in general. 1. Contract, agreement, consent or *espousals*. 2. Solemnization. 3. Cohabitation or consummation.

It is said that *espousal* and *solemnization* are sufficient to make a marriage complete. How far this may be so in a spiritual sense, it is not necessary to inquire, and how far it might be sufficient to prevent another marriage.

There may be in some cases all three of the requisites, and still no dower; and there may be cases where the marriage is annulled, and still there is dower.

I apprehend the true rule to be that espousals and solemnization are held sufficient on the ground that the *concubitas* is presumed to follow and relate back, but not on the ground that it is dispensed with. 33 Law Library, 43.

It may not be necessary to prove it to shew a valid or complete marriage, but the case is very different, where it is shewn that it never occurred.

Is it an essential and indispensible requisite to the relation of marriage. It certainly is.

The incapacity of either party to consummate the marriage by sexual union, is so radical an objection, that it is sufficient to vacate the contract *ab initio*, and bar dower, as if the marriage never was valid. 33 Law Library, 29, 170.

Shall the wife, who refuses by her own act, to consummate the marriage, have a higher right than one who from misfortune or disease, is incapacitated. In both cases, the object of the marriage of procreation of children is defeated.

If then the objection is sufficient to avoid the contract, *ab initio*, as if it never did exist, it would seem that proof of it, would be sufficient to bar a claim founded on such a contract, and which requires its existence.

By our statute, abandonment is declared sufficient cause for divorce; refusal to cohabit is equivalent; therefore

it is considered as an essential ingredient to the contract. There is much uncertainty as to what is sufficient to constitute marriage. Before the marriage acts in England, it was considered governed by the law of the ecclesiastical courts. 2 Roper on Pro., Addenda, 32 Law Lib. 187; 33 ib. 50.

Espousals alone, when not solemnized, although *de praesenti*, would not, in England, give dower. 32 Law Lib. 194.

A marriage *per verba de futuro*, succeeded by cohabitation, (in the absence of the marriage acts) is sufficient to give dower. So it is held that a contract of marriage, *per verba de praesenti*, is sufficient, cohabitation being presumed to follow. But the rule should not hold where it is shown it does not follow, because it is a material part of the contract.

A marriage not consummated, and which is arrested without going into effect, canot give dower.

One of the requisites at common law, to create the right of dower is, that the case must be such that any issue she may have must be capable inheriting the estate. 4 Kent's Com. 35; 3 Bacon's Abr. 191; Clancy, 195. A marriage therefore, contracted and solemnized, but arrested before consummation, fails in this quality, requisite to give dower; because the issue she might have could not inherit the estate—they must be illegitimate. Such would be the case where there was issue of a marriage, but where the mother had been previously married, and the first husband living. There, no dower could be claimed. Again—no dower is given, where, though there be a marriage, there can be no children; as if the wife be not over *nine* years old at the time of the husband's death. The reason given is, that she can have no issue under that age. 3 Bacon's Ab. 192. And the reason given why it is allowed, when the wife is, at the time of the marriage, of advanced age, is, that the law cannot determine at what time the capacity to have issue ceases. 3 Bacon's Ab. 192; 3 Vin. 210. The contract alone is not sufficient. 3 Bacon's Abr. 206. Neither is the contract and the solemnization sufficient—the validity of the contract, such as the law requires, viewed as a question of contract, will be inquired into, even where there has been cohabitation. 2 Dana, 102; 2 Black. 130; Clancy, 197; 3 Bac. Ab. 207.

Our ideas of marriage are derived from the ecclesiastical

courts, and founded on the civil law. By the civil law, consent and solemnization were sufficient, as I have said, before cohabitation being presumed. But the marriage was not final till cohabitation followed : and if one party desired to withdraw, and join a religious order, such party could do so, notwithstanding the marriage (if not consummated) and then the other could marry again. 1 Moreau & Carleton's Partidas, 453-4 ; Partida 4, title 2, of Marriage.

2. The next view we shall take of this case is, supposing the contract of marriage to have been complete and perfect, how is it to be viewed here, and on what principle shall the court act ?

It is insisted on our part, that the contract of marriage, so far as a right to property is concerned, is to be viewed like any other contract, and be governed by the laws governing all contracts for property between the parties. 1 Black. Com. 433. And secondly, that the court of chancery will apply all the rules of equity to this subject, as to any other, and will not change the laws or principles of its action, for this nor for any other case. Shelford on Marriage and Divorce, 33 Law Lib. 25.

It is "the lawful coupling and joining together of man and woman in one individual state or society of life, during the life-time of one of the parties, and this society of life is contracted by the consent and mutual good will of the parties toward each other." It is "for the mutual help of husband and wife." 33 Law Lib. 26. It is "the means of comfort to the married pair"—"the preservation and comfort of children." "The characteristic feature of the marriage contract is its permanency." (page 26.) "It is the most solemn engagement which one human being can contract with another." "It is the basis of civil society, and of sound morals—the source of domestic affections."

Now all these objects were wholly lost to Barclay in this case, and that by the wilful act of the wife. In lieu thereof, the greatest possible degree of disappointment, mortification, and destruction of peace of mind were produced, followed by speedy death.

There was, therefore, clearly, an utter failure of all the beneficial considerations to be obtained by the marriage, which

no damages could compensate. It is therefore against conscience to attempt to enforce this contract, even in a court of law—much more so, in a court of chancery.

This is an unexecuted contract, which is sought to be enforced. We have shown, that even had it been an executed contract, the cause of objection would be sufficient to disolve it. "Marriage is the union of husband and wife, with *intention* of always living together, and never separating." Moreau & Carleton's Partidas, vol. 1, 453.

Phillips, contra.

The decree was for dower in the particular lot described in the bill, and it is alledged for error.

1. That the original bill and supplement, limit the complainant's right to dower only in such property as Barclay died siezed and possessed of, because this is the extent of the allegations.

The recital of the original bill in the supplement amounts to nothing—it was filed to bring another party before the court, and can neither enlarge or diminish the subject matter of complaint. Beside which, referring to the original bill itself, its own description is contradicted by the best evidence.

Although the original bill may not be free from hypercriticism, it sufficiently appears, that though Barclay was seized and possessed of the particular lot described, and that the complainant had never renounced her right to dower, and the defendant was called upon to deny this allegation, and also to set out what property he died seized and possessed of. It is evident, therefore, that it is not alledged he died seized and possessed of this particular lot; but the inquiry of the executors as to what property he died seized and possessed of, was in addition to the allegation.

Assuming that relief could only be granted as to the estate whereof Barclay "died seized and possessed," it is contended that the deed for the lot in question, vested the title in McCoy and Potier, and there was nothing for the decree to act upon under the allegations.

The deed conveys the property in trust for the use and benefit of the grantor during his natural life, and after his death, for the use of his children.

The deed was not made for any valuable consideration—was never put upon record, and leaves the property, as far as complainant's rights are concerned, as they would be without the deed. So, if the whole right of the complainant had been confined to the property of which Barclay died seized and possessed, this instrument would present in law no obstacle to the relief prayed for, because as to her the deed being purely voluntary, he did die seized and possessed.

The evidence of seizin would have been good without the production of the deed from Mansony. It is sufficient to show possession in the husband during coverture. 2 Rep. Com. L. 59; 1 Baily, 77; 3 Fairf. 41.

The decree for one third of the rents and profits, from the death of her husband, is but fulfilling the character of the title which was then completed. Jackson v. O'Donegay, 7 Johns. 247; Curtis v. Curtis, 2 Bro. C. C. 632; Dormer v. Fortescue, 3 Atk. R. 130; Beavers v. Jemison et al. 11 Ala. Rep. 34.

But the decree is too favorable to appellant, for it should have allowed interest on the arrears. . See case above cited, of Beavers v. Jemison.

The fact that the complainant left her husband's house, and refused to cohabit with him, is no bar to dower. The right flows from three successive circumstances—marriage, seizin, and death of the husband—the two first produce the title to dower, and the last consummates it.

Marriage consists in—1. The espousal, or personal contract. 2. The celebration of the contract according to the law. This being complete, all the rights and liabilities of the marriage state arise. "*Consensus non concubitus facit matrimonium.*"

Dower is considered of such a privileged character, that even in the case of a null marriage, arising from positive disability—Lord Coke has said, "if the wife be past the age of nine years at the time of the death of the husband, she shall be endowed, of what age soever her husband be, albeit he were but four years old." Co. Litt. 33, a.

By the common law, elopement and adultery worked no forfeiture. This rule was introduced by statute. Sidney v.

Sidney, 3 P. Wms. 269; Blount v. Winter, Ib. 276; Park on Dower, 223.

But the facts set out in the affidavit of Gardette, show neither adultery or elopement. They exhibit the case of a young girl, over-persuaded by designing relatives, to connect herself in marriage with a man sixty years of age, distressed by the want of those affections which naturally belong to the marriage state, seeking, in her mother's bosom, protection from that dominion which so ill assorted an alliance had imposed upon her.

The defence set up shocks our sense of propriety, is unsupported by a single adjudication, and finds no countenance in the analogies of the law.

CHILTON, J.—The decree in this case, cannot be sustained. The register reported one-sixth of the entire value of the premises, as dower, and the defendants are required to bring this sum, together with one-third the rents from the death of the husband, and the costs, into court, and on failure, the premises are decreed to be sold to raise the amount.

The chancellor, it seems, adopted the South Carolina rule, which is influenced by a statute of that State. Here we have no such statute, and our decisions must conform to the common law.

The mode of assigning dower in such cases as the one before us, has been so fully discussed, and decided in Beavers and Jemison v. Smith, 11 Ala. Rep. 20, and in Johnson v. Elliott, 12 Ib. 112, that it is altogether needless to say more upon it here. These cases will constitute sufficient guides for the future conduct of the cause, and show that the chancellor erred in decreeing a sale of the premises.

2. There are no allegations in the original bill, which would limit the issue to the lands of which the husband of the demandant *died seized*, and the mis-recitals of the contents of the original bill in the supplemental bill, which was filed to reverse the suit in the name of the husband, whom complainant, in the mean time, had married, cannot have the effect to change the character of the relief sought by the original bill. The supplemental and original bills must be taken together, as forming but one bill, and although the allega-

tions are somewhat loosely made, and liable to hypercriticism, still we think it is substantially averred that the deceased was seized of the premises in which dower was allotted during the coverture, and a discovery is sought as to other lands of which he *died* seized and possessed, in which dower is also prayed. 14 Ala. Rep. 150.

3. As to the main defence relied upon, the facts on which it rests may be thus briefly stated: The complainant, a young lady, aged about 16, was married to the deceased, who was an elderly gentleman. The espousals and solemnization of the marriage having been completed, it appears the relation stopped; for although she immediately went home with her husband, she refused to recognize him as such, and having remained for a few days, she abandoned him, and returned home to her mother, where she continued to live up to the death of her husband. In the mean time, she rejected all overtures for reconciliation, protesting he was no husband of hers, and that she would have nothing to do with him, or any thing that belonged to him.

The counsel insists, that the marriage not having been followed by cohabitation, was not consummated, so as to give to the wife the right of dower. The position cannot be supported. Mr. Jacobs (tit. Marriage) says, "nothing more is necessary to complete a marriage by the laws of England, than a full, free, and mutual consent between the parties," they being capable of entering into such a relation. Mr. Wood, in his Institutes of the Civil Law, p. 120, lays down the doctrine broadly, "that espousals *de praesenti*, or marriage, is contracted by consent only, without carnal knowledge." It is clear that the *vinculum matrimonii*, is the consent freely given by the parties competent to contract. "*Nuptias, non concubitas sed consensus facit*," is a maxim both of the civil and common law. 2 Kent's Com. 89; Reeve's Dom. Rel. 195, note 1; Dig. L. 50, tit. 17, § 30; Jackson v. Winne, 7 Wend. Rep. 50; Fenton v. Reed, 4 Johns. Rep. 52; Hantz v. Seeley, 6 Binn. Rep. 405; Bunting v. Leppingwell, 6 Coke's Rep. 29; 2 Salk. 447.

The marriage, in this case, having been solemnized according to our statutes, we are bound to regard it as valid

and complete, and as entitling the parties respectively, to all the rights which accrue upon entering into such relation.

4. The marriage being valid, has the complainant, by her conduct, forfeited her claim to dower in a court of equity, in which forum she seeks its allotment? This is a question of some embarrassment. We are not prepared to say, that if the object of the complainant in submitting to the marriage ceremony, was merely that she might entitle herself to be endowed of the property of the deceased, *without any intention* of performing any of the duties devolved upon her as a wife, and that had she carried out this intention, it would not have amounted to a *fraud* upon the husband, which in equity would induce the court to refuse its aid in allotting her dower out of his land. We express no opinion upon this point, as the facts of this case do not call for it. We think the proof in the record shows that the marriage was contracted and solemnized in good faith, and that the conduct of the lady, so unusual, as well as reprehensible, is to be attributed, not to any intention existing *previous to, or at the time of marriage*, but to a sudden sense of the unfitness of the match, which resulted in disgust for her husband, and at once banished all hope of that affection, so indispensable to render this most sacred relation, the source of joy and domestic comfort. Her conduct was certainly indefensible, unless indeed it finds an apology in her tender years, and consequent indiscretion, and in the unfortunate importunities of friends. Be this as it may, we find no warrant in the law, which equity must follow, to bar her right of dower by reason of it. And the learned counsel has not been able to find any adjudicated case, indicating such a rule.

It seems that the tenant in dower was greatly favored by the common law, so much so, that before the statute of Westminster 2, (13 Edw. 1) the adultery and elopement of the wife did not bar her right. 2 Co. Inst. 435; Park on Dower, 75.

So in Cogswell v. Tibits, 3 New Hamp. Rep. 41, it was held, the wife did not forfeit her right to dower by committing adultery, unless she eloped with the adulterer.

It is said also, if the wife refused to bring an appeal of her husband's death, when he was killed by another, she shall

not lose her dower; for this is only a waiver of the privilege the law gives her, to be avenged of her husband's murderer. So it seems, if she refused to minister, or come to her husband in his sickness, yet she shall be endowed, "for this is only undutifulness, which the law does not punish with the forfeiture of her subsistence." 2 Bac. Abr. 360, per 364. Indeed, such was the privileged character of dower at the common law, that although the parties were *infra annos nubiles*, yet, according to Lord Coke, "if the wife be past the age of nine years at the husband's death, she shall be endowed, of what age soever her husband be, albeit he were but four years old." Co. Lit. 33, a. So, in cases where the marriage was void *causa precontractus*, *consanguinitatis*, *frigiditatis*, or other similar causes, yet if the husband died before sentence of divorce pronounced, his wife *de facto* was entitled to dower. 2 Bac. Abr. 370. These authorities may suffice to show, that even though our statute authorized a divorce for an abandonment of ten months, instead of three years, yet no divorce having been obtained, the wife is dowable.

5. The counsel for the defendants below, insists, that the court of chancery should apply the ordinary rules which govern its action in civil contracts, to this case, and that the wife, having repudiated the contract of marriage, and violated it *in toto*, can claim no benefits under it. To this we reply, that dower is a *legal* right, and whether application for its recovery be made to a court of law or equity, the principle of decision is the same. 15 Peters's Rep. 21. When it is consummated by the three requisites, marriage, seizin, and death of the husband, the statute makes it imperative upon the court to allot it. Digest, 172. And it is for the legislature, not the courts, to prescribe the causes for which it may be forfeited. This may be, and doubtless is, a hard case, but the law would cease to be a *rule* of action, if the courts may bend its provisions to meet the exigencies of such cases.

6. There was no error in making the husband of the demandant a party to the bill. It may be well questioned, whether he was not an indispensable party. Adams v. Barron, 13

Ala. 205. See Hickman et al. v. Irving's heirs, 3 Dana's R. 125, as to the husband's interest.

7. It may be well to observe, lest our silence may be misconceived, that we do not see on what rule of evidence the copy of the deed from Mansony to Barclay was admitted. No notice was given to the opposite party to produce the original, nor was it shown to have been lost. This secondary evidence was, then, clearly inadmissible.

8. There is nothing in the objection, that the commissioner swore the witnesses to the deposition they gave. He was invested with this power by the commission, as an officer of the court *pro hac vice.* 9 Por. 160. The objection was also too late, being made for the first time at the trial. Scott v. Baber, 13 Ala. Rep. 182. As to the competency of the commissioner, see 13 Pick. 279.

For the error in the decree above noticed, the cause is reversed, and remanded for further proceedings.

STRANGE v. POWELL.

1. The want of profert, in a declaration of the instrument sued on, could only be reached at common law by special demurrer, and, since the passage of the statute requiring all demurrers to be general, a defect, that before could be reached in no other way than by special demurrer, is cured, and cannot be assigned as cause of demurrer.
2. When pleas are pleaded in the court below by name merely, which the court, on motion of the plaintiff, orders to be stricken out, in the absence of any thing in the record, going to show, that form was waived, and the plaintiff here insists on the objection, this court cannot regard them as pleas, and will not reverse the action of the court below, although such pleas, if they had been pleaded in due form, might have constituted a bar to the action.
3. Where a statute creates a liability to pay money, and prescribes no particular form of action for its recovery, an action of debt is the appropriate remedy.

Error to the Circuit Court of Macon. Before the Hon. N. Cook.

This was an action of debt, brought by defendant, against plaintiff in error, on an award, with the common counts. The defendant below demurred to the first and second counts of the declaration, for want of profert of the award, but the court overruled the demurrer. He then pleaded as follows:

The defendant, in short by consent, pleads—1. The general issue. 2. The statute of limitations of six years, to each count. 3. The statute of limitations of three years, to each count. 4. Payment. 5. Set-off.

Issue was taken on the first, fourth, and fifth pleas, and a motion made to strike out the second and third pleas, which the court sustained. After due proof of the award, the defendant proved that he paid it in February, 1839, and the plaintiff proved that the payment was made in the bills of the Wetumpka Trading Company. The defendant asked the court to charge the jury, that if they believed the defendant paid the award between the 2d February and the 3d July, 1839, in the bills of the Wetumpka Trading Company, the plaintiff cannot maintain an action of debt for the amount of said bills. The court refused to give the charge, and the defendant excepted.

The several rulings of the court, and the refusal to give the charge asked, are now assigned as errror.

J. E. Belser and McLester, for plaintiff in error.

1. The demurrer to the declaration should have been sustained. The first count is bad, because there is no profert of the award, and was therefore not binding on the defendant. The second count, is also bad. The award is not shown to have been in writing. It is not averred, that the defendant had notice of the award, and there is no profert. Again, the declaration does not show, that the arbitrators were sworn, and the award does not settle all the matters in dispute between the parties. The two half shares in the land, are not decided upon, as shown by the award, and it is therefore not binding. Fisher v. Pembly, 11 East, 188;

Cargy v. Atcheson, 2 Barn. & Cres. 170; 6 Shep. 251; 13 Conn. 236.

2. The court erred in striking out the second and third pleas, pleaded to each count in the declaration, and in not putting the plaintiff on his demurrer, before they were stricken out. The award is not under seal, therefore the 16 years' statute (Clay's Dig. 327, § 81,) does not apply to it. The limitation which governs it is six years. Clay's Dig. 326, § 78. The award not being under seal, is like unto a witness certificate, or an ascertained item. Carlisle v. Reynolds, 9 Ala. 969; Drinkwater v. Holliday, 11 Ib. 134; Caruthers v. Kinkle, 3 Ib. 579; Smith v. Bank of Mobile, 7 Ib. 880. The common counts being added to the declaration, the two pleas stricken out might have become proper under the evidence.

3. The court should have given the charge asked for in the court below, on the whole of the testimony included in the bill of exceptions. Lowry v. Murrell, 2 Porter, 280; Whitlock v. Van Ness, 11 Johns. 409; Wiseman v. Lyman, 7 Mass. 286.

Rice & Morgan, contra.

1. Where the declaration is in debt, and contains a count upon an award, and all the common counts (by consent of the defendant,) it is not error for the court, on plaintiff's motion, to strike out what purports to be the second and third pleas, in the following words: "2. The statute of limitations of six years, to each count. 3. The statute of limitations of three years, to each count," especially when there is nothing to show that such pleas were by consent of plaintiff, taken in short, and where it is shown that the court refused "to require of plaintiff to file his demurrer to each of said pleas."

2. Although a demurrer admits the plea to be properly filed, and raises only the question of its sufficiency, yet no such admission is implied in a motion to strike out a plea.

3. When five pleas are filed, in short, and the plaintiff takes issue on the first, fourth, and fifth, and moves to strike out the second and third pleas, and where the primary court refuses to put the plaintiff to his demurrer to the second and third pleas, a revising court is bound to regard the plain-

tiff and the court below as refusing to recognize the names of pleas, for the pleas themselves—especially, when those pleas are the statutes of limitations.

4. The statute of limitations of Alabama, does not apply to actions of debt, on awards not under seal;—our statute does not apply to all actions of debt, without specialty, but such only as are grounded upon "any lending or contract." Jordan v. Robinson, 15 Maine Rep. 167; Hodsden v. Harridge, 2 Saund. Rep. 64.

5. The award in this case must be regarded as under seal. What is said as to sealing awards in the statute, is merely directory; and an award, otherwise unobjectionable, will not lose its effect merely because there is no seal attached to it. Price v. Kirby, 1 Ala. Rep. 184; Martin v. Chapman, Ib. 278; Wright v. Bolton, 8 Ib. 549, where the award was not under seal, but was held equally conclusive.

6. The evidence of plaintiff's son, was clearly admissible. It tended directly to identify the bills or notes, paid to his father, by the witness Davis, for Strange, as the bills or notes of the Wetumpka Trading Company—and to fix a liability on Strange, on account of passing off those bills to Powell, the plaintiff below. Chit. on Bills, 671, 9th Am. ed.; Strattan v. Hull, 3 Price, 253.

DARGAN, J.—This was an action of debt, brought upon an award. The defendant demurred to the declaration, and the court overruled the demurrer. The defect in the declaration is supposed to be, in not making profert of the award, and for this omission, it is contended the declaration is bad. We will not inquire whether this declaration would be defective, even if tested by the most rigid rules of pleading at common law; for it is certain, that the omission to make profert of a deed, or any other instrument declared on, could only be taken advantage of by a special demurrer. Minor's Rep. 123; Ib. 89. By statute in this State, all demurrers are general, and defects therefore in pleading, which could at common law be reached only by a special demurrer, are cured, and cannot now be assigned as causes of demurrer.

2. The second assignment of errors, controverts the propriety of the action of the court, in striking out the second

and third pleas. There were five pleas, pleaded in short, or by name. Issue was taken on three, and the plaintiff moved to strike out the second and third, which motion was granted. These pleas were, the statute of limitations of six years, and the statute of limitations of three years. It is contended by the defendant in error, that these pleas are insufficient in form, as well as in substance. The pleas are merely stated by name, and there was no obligation on the plaintiff to receive them as pleas; and there is nothing in the record from which we can infer, that he consented to consider them as pleaded in proper form. We know that the practice has prevailed in the circuit court, of pleading the usual pleas, merely by stating their name; and when no objection is made to the plea thus pleaded, we will not permit the objection to be first raised in this court. Abercrombie v. Mosely, 9 Porter, 145, and cases there cited. But when objections were made to such pleas in the court below, and are not waived here, we cannot consider them as pleas; nor pronounce, that the court erred in striking them out, even if they would have constituted a bar, if pleaded in due form.

3. Nor is there any error in the refusal of the court, to give the charge requested by the defendant. The testimony tended to show, that the defendant, in payment of the award, after the 2d of February, 1839, but before the 3d day of July then next following, transferred to the plaintiff, bills of the Wetumpka Trading Company. These bills were in the form of bank bills, and intended to pass as money, but the company was not chartered, nor authorized by law to exercise the privilege of banking.

The act referred to expressly declares, that if any person, after the 2d of February, 1839, and before the 3d of July thereafter, shall transfer any such bills, he shall be deemed, and taken as the indorser thereof, and shall be liable for the amount of such bill, or bills, without any demand being made of the company, or notice given to him who transferred them. Under this statute, the plaintiff had the right to bring an action of debt, to recover the amount of the bills of the defendant, if they were transferred by him to the plaintiff, after the enactment of the statute, and before it expired.

It is too well settled to be now controverted, that when a

statute creates a liability to pay money, but does not prescribe any remedy by which a recovery shall be had, debt is the proper remedy. 7 Porter, 282; 2 McLean's Rep. 195.

There is no error in the record, and the judgment must be affirmed.

CHILTON, J., not sitting.

HOPPER, ADM'R, v. ASHLEY.

1. E, was indebted to A, by note, in the sum of $280. As an off-set against this note, F, transferred to E, a note which he held on A, for $300, but A was not present, nor was E acquainted with the hand-writing of A. E handed back the note of A, to F, that he might exchange it with A, for the note of E, for $280, and a few days thereafter, F handed to E his note for $280. Held, that this testimony was not sufficient to establish the genuineness of the signature of A, to the note of $300.
2. A witness who has seen a party write once, but who says he does not know his hand-writing, may be asked, "has the hand-writing which you have seen, made any impression of the general character of his hand-writing upon your mind? If yea, does the signature of the writing presented to you, make an impression on your mind, amounting to a belief, that the writing shown you, is the writing of the plaintiff?"
3. The genuineness of a receipt being in issue, the court charged the jury, "that if the evidence, although it preponderated in favor of the receipt being genuine, still, if upon a fair and full examination of it, their minds were left in a state of doubt, and uncertainty, as to its being genuine, they should find in favor of the plaintiff upon that point." Held, that this charge could not be supported, as the jury were authorized to infer, that *demonstrative* evidence was required, and that *moral* evidence was insufficient.

Error to the Circuit Court of Montgomery. Before the Hon. Geo. Goldthwaite.

THIS was an action of assumpsit, on a promissory note,

made by John L. Flowers, in his life time, for $4,000, dated in 1843, and due in April, 1844, instituted by defendant in error, originally, against Erick Hueston, as the administrator of said Flowers, and afterwards, on the resignation of Hueston, revived against plaintiff in error, as the administrator *de bonis non.* On the trial, a bill of exceptions was sealed at the instance of plaintiff in error, from which the facts appear. One Elisor, a witness introduced by plaintiff in error, proved that in 1844, he hired from defendant in error two negroes, for $280, and gave him his note therefor payable the first of January, 1845. That in December, 1844, intestate shipped ten bales of cotton for the witness to Mobile, and shortly afterwards, having received the proceeds, transferred to witness defendant in error's note for $300 of the amount. That the object of this was to off-set the $280 note that witness had previously given. That defendant in error was not present when this transfer was made; and at the same time that the intestate transferred the $300 note to witness, witness handed it back to the intestate, for the purpose of effecting the exchange with defendant in error. That by the advice of the intestate, witness had an advertisement inserted in a newspaper published in Montgomery, giving notice that he had an off-set against the $280 held by defendant in error, and in a few days thereafter, intestate handed him his $280 note. The witness also stated, that he did not know the handwriting of defendant in error, and had no knowledge that the note transferred to him by the intestate was in the handwriting of defendant in error, other than what took place between the intestate and himself. Whereupon, the defendant in error moved to exclude all of the evidence of the witness, which motion the court sustained, and the plaintiff in error excepted. Among other matters in evidence on the part of the plaintiff in error, was a receipt in these words: "Rec'd of Jno. L. Fowers, four thousand dollars, in full payment of all notes, accounts, and demands, up to date. January 1st, 1844. Wm. Ashley." The genuineness of this receipt being disputed, the plaintiff in error introduced one Brothers as a witness, who testified that he had seen the defendant in error write once, but that he did not know his hand-writing. The witness was then duly advised by the court as to the

character of evidence required in cases of that kind, that he was not required to swear positively to the hand-writing, but that if from having seen the defendant in error write once, or oftener, he should believe that he was acquainted with his hand-writing, or if, from having seen him so write, he believed he would be able to recognize his writing, that he would then be competent, and bound to give his opinion, or belief, as to whether the writing shown him was the writing of the defendant in error. The witness insisted, that he was not acquainted with the hand-writing of defendant in error, and did not believe that he could recognize, or know it, if he saw it. The plaintiff in error then insisted on asking the witness the following questions: "Has the hand-writing of the plaintiff in error, which you have seen, made, or left any impression of the general character of his hand-writing on your mind? If yea, does the signature of the writing presented to you make an impression on your mind, amounting to a belief, that the writing shown you is the writing of the plaintiff?" The questions were objected to by the counsel of the defendant in error, and the court sustained the objection, whereupon the plaintiff in error excepted.

The evidence as to the genuineness of the receipt being conflicting, the court charged the jury, "that they must be satisfied, from the evidence, that the receipt was genuine, and that a preponderance of evidence upon that point, if it failed to satisfy the minds of the jury, that the receipt was genuine, would not authorize them to find in favor of the defendant upon that point;" "that, although the evidence preponderated in favor of the receipt being genuine, still, if upon a fair and full examination of it, their minds were left in a state of doubt and uncertainty, as to its being genuine, they should find in favor of the plaintiff upon that point." To this charge the plaintiff in error excepted, and now assigns it, together with the several rulings of the court, as error.

Williams, Watts and Jackson, for plaintiff in error.

To show that the court erred, as alledged in the assignment of errors, it is insisted—

1. That the testimony of Elisor tended to prove, that the

note for $300 was Ashley's. If it had the slightest tendency to prove that fact, the court ought not to have excluded it, but should have permitted it to go to the jury for what it was worth. The court usurped the province of the jury, in determining that this proof was not sufficient. See McKenzie v. McRae's adm'rs, 8 Por. 70; McNeill's ex'rs v. Reynolds, 9 Ala. 313; Leavitt v. Smith, 14 Ala. 280; Wiswell v. Ross and Earle, 4 Por. 321; Harrold v. Floyd and wife, 3 Ala. 16; Cuthbert v. Newell, 7 Ala. 457; Smith v. Armistead, Ib. 698.

2. If Ellison's testimony tended to prove that the note of $300 was Ashley's, the relevancy of it is at once seen. That fact being established, the inference would be, that instead of Flowers owing Ashley, in fact Ashley owed Flowers. And hence, this evidence was very important to defendant. Circumstantial evidence may prove one fact, as well as another. Facts and circumstances may prove the making of a note, as well as witnesses who may know hand-writings.

3. The charge of the court as to the preponderance of the proof, went further than is supported by authority. In a civil case, where the proof preponderates in favor of either side, the jury are authorized to find in favor of that side. They are not bound so to find. The court, in the charges given, prevented the jury from exercising this authority, and therefore misled them. Lindsy v. Perry, 1 Ala. 203; Stewart et al. v. Hood et al. 10 Ib. 600; 1 Stark. Ev. § 52, 53, ed. 1826.

4. It is insisted that the rule is the same, in relation to plaintiff and defendant. If the testimony preponderates in favor of either side, that side is entitled to the verdict, provided that preponderance amounts to a *prima facie* presumption. The law never asks mathematical certainty—it is based on reasonable probabilities: and although the testimony may be conflicting, and leave some doubt in the minds of a jury, in a civil case, that doubt cannot, nor ought it to prevent them from finding a verdict in favor of the preponderance. The charge of the court restricted them to a particular extent of preponderance. If there be any rule beyond a bare preponderance, what is it? What sort of preponderance is it, that is to govern? How far ought the pre-

ponderance to go? Or how great a preponderance, is sufficient to authorize a verdict? There may be a thousand degrees of preponderance. There must be no arbitrary rule adopted. It must be left to the good sense of a jury, to say what kind of a preponderance they will act on. The court cannot interfere. 1 Stark. Ev. 52, 53; see also 1 Stark. Ev. 506, ed. of 1842.

Belser & Harris, Elmore & Yancey, and Martin & Baldwin, contra.

1. A witness, having no previous knowledge of the hand-writing of a party, cannot be permitted to testify in relation to it. Paige v. Homans, 2 Shepley, 479, (14 Maine); Wilson v. Kirkland, 5 Hill's N. Y. Rep. 182; 1 Sup. U. S. Dig. 691, § 758; Pope v. Askew, 1 Iredell, 16; 1 Greenl. Ev. 612, § 576, 577; 6 Cowen, 112; 2 Johns. Cas. 214.

2. The testimony of Ellison was irrelevant, and not the best evidence which the nature of the case admitted of. 1 Greenl. Ev. 59, § 52; § 576. Ellison was called by plaintiff in error, to prove the existence of a note on Ashley, when he knew nothing of Ashley's hand-writing, and could not identify it as Ashley's note.

3. The charge as to the receipt was correct. Whenever a *prima facie* case is established, or a legal right once admitted, the party against whom the *prima facie* case is established, or the legal right admitted, must discharge himself by full and satisfactory proof. 1 Stark. Ev. 451, marg'l p. 452; 1 Greenl. Ev. 4, § 2; Gray v. Gardner, 17 Mass. R. 188; Attleborough v. Middleborough, 10 Pick. Rep. 378; Ross v. Gould, 5 Greenl. R. 204; 2 Phil. Ev. C. & H's Notes, 476-8; Kilburn v. Burnett, 3 Metc. 199; Minot's Dig. 287, § 33.

COLLIER, C. J.—1. The testimony of the witness Elisor, was properly excluded. He declared that he was unacquainted with the hand-writing of the plaintiff, and had no other information upon the subject than was communicated to him by the defendant's testator. This was altogether insufficient to establish the genuineness of a writing, which could only be admitted upon proof that it was subscribed by the party, who purported to have made it, or by his autho-

rity. The admission of its genuineness cannot be predicated of the advertisement by the witness, that he held a set-off against the note which he had previously made to the plaintiff. It does not appear, that the plaintiff ever read, or heard of that advertisement, and if he did, it would not have informed him, what was the character of the proposed set-off. Nor is the fact shown by the payment of the witness's note to the plaintiff, by the testator. The testator was indebted to the witness, and transferred to him the note supposed to have been made by the plaintiff, that he might, by an exchange of paper, extinguish his indebtedness to the plaintiff; afterwards, the witness returned to the testator the note he had received from him, that he might obtain the note the plaintiff held against the witness, which the testator promised to do; and in a few days after the advertisement appeared, the testator brought to the witness, the note which the latter had given to the plaintiff. It may be, that the testator took up the witness's note by the payment of money, or something else which the plaintiff esteemed an equivalent; but it would be a most unwarrantable presumption, in the absence of all legal proof that the testator held a note against the plaintiff, to infer that the payment was made by an exchange of paper.

2. Where the knowledge of the hand-writing of a party is acquired by having seen him write, the usual inquiry of the witness is, whether he has seen the party write, and afterwards, whether he believes the paper in dispute to be his hand-writing. The course of examination involves two questions; first, whether the supposed writer is the person of whom the witness speaks; secondly, if he is the person, whether he wrote the paper in dispute. The first is a question of identity; the second, a question of judgment, or a comparison in the mind of the witness, between the general standard, and the writing produced. This kind of evidence, it is said, like probable evidence, admits of every possible degree, from the lowest presumption, to the highest moral evidence. It may be so weak, as to be unsafe to act upon; or so strong, as in the mind of every reasonable man, to produce conviction. But, whatever degree of weight his testimony may deserve, which is a question exclusively for the

jury, it is an established rule, that, if he has seen the person write, he will be competent to speak to his hand-writing; and this, although the impression on the mind of the witness may be faint and inaccurate. 1 Phil. Ev. 484. Mr. Greenleaf says, it is sufficient to let in the witness's belief, that he has seen the party write but once, and then only his name. "The proof in such case, may be very light; but the jury will be permitted to weigh it. 1 Greenl. Ev. § 577. In Carter v. Connell, 1 Whart. Rep. 392, the question proposed was, "are you able to say whether, to the best of your impression, this paper is in the hand-writing of J C (the party) or not?" The court said, to inquire of a witness what is his *impression*, is descending to a test too vague to form a judgment upon—it is like asking, what was his understanding of a conversation, instead of inquiring what the parties said. The learned annotators upon Phillips on Evidence, remarking upon this decision, say: "Perhaps, under the circumstances, particularly as an objection was raised in due time, and the question not modified, the inquiry was to be understood as calling for the *mere conjecture* of the witness, without reference to any recollection of his, in respect to the character of the party's hand-writing. If the usual inquiry as to belief was purposely avoided with this view, the court were doubtless right in overruling the question put. But it is difficult to maintain, consistent with the cases, that a witness shall not testify, unless he will express a decided belief in respect to the hand-writing. If the witness's knowledge appears to have been derived from proper sources, its degree respects the credence to be awarded to what he says, rather than its competency." 3 Phil. Ev. C. & H's Notes, 1321, et seq. See further, Garrells v. Alexander, 4 Esp. Rep. 37; Stranger v. Searle, 1 Esp. Rep. 14; Doe ex dem. Mudd v. Suckermore, 5 Adol. & Ellis's Rep. 703; Utica Ins. Co. v. Badger, 3 Wend. Rep. 102; Redford's adm'r v. Peggy, 6 Rand. Rep. 316; Jackson ex dem. Van Dusen v. Van Dusen, 5 Johns. Rep. 144; Freelove v. Fenner, 2 Gall. Rep. 170; 2 Stark. Ev. 512, 7th Am. ed.

In Riggs v. Tayloe, 9 Wheat. Rep. 486, in order to let in secondary evidence of an agreement alledged to be lost, a party made an affidavit, stating "that his impression is, that

he tore up the same:" *Further*, "he is not certain that he did tear it up, and does not recollect doing so, but such is his impression. If he did not tear it up, it has become lost or mislaid," &c. It was insisted at the bar, that the affidavit was not sufficiently certain and positive—it stating the *impression* of the affiant, that he tore up the agreement, or the alternative, that it is lost or mislaid. The court said, "we do not concur in this reasoning. An *impression*, is an image, fixed in the mind, it is belief; and believing the paper in question was destroyed, has been deemed sufficient to let in the secondary evidence;" whether the writing was torn up, or lost or mislaid without being actually destroyed, the affidavit was sufficiently certain and positive. See also Doe ex dem. Mudd v. Suckermore, 5 Adol. & Ellis's Rep. 703. In the last case, the judges who presided, delivered their opinions *seriatim*. Coleridge, J., said, "the rule as to the proof of hand-writing, where the witness has not seen the party write the document in question, may be stated generally thus: Either the witness has seen the party write on some former occasion, or he has corresponded with him, or transactions have taken place between them, upon the faith that letters purporting to have been written or signed by him, have been so written or signed. On either supposition, the witness is supposed to have received into his mind an impression, not so much of the manner in which the writer has formed the letters in the particular instances, as of the general character of his hand-writing; and he is called on to speak as to the writing in question, by a reference to the standard so formed in his mind. It is obvious that the weight of this evidence may vary in every conceivable degree; but the principle appears to be sound, both in regard to the test of genuineness, and the acquisition of the means of applying it." Patteson, J., remarked, that "all evidence of hand-writing, except where the witness sees the document written, is, in its nature, comparison. It is the belief which a witness entertains, upon comparing the writing in question with an exemplar in his mind, derived from some previous knowledge. That knowledge may have been acquired, either by seeing the party write, in which case it will be stronger, or weaker, according to the number of times, and the periods, and other

circumstances under which the witness has seen the party write, but it will be sufficient knowledge to admit the evidence of the witness, (however little weight may be attached to it in such cases,) even if he has seen him write but once, and then merely signing his name; or the knowledge may have been acquired by the witness having letters, &c. of the party," &c.

The witness, Brothers, who was introduced for the purpose of proving the genuineness of the receipt purporting to have been made by the plaintiff to the testator, answered, that *he had seen the plaintiff write once, but he did not know his hand-writing.* The counsel and the court both informed the witness, that he was not required to swear positively as to the writing, but if, from having seen the plaintiff write once, or oftener, he believed he was acquainted with his hand-writing, or would recognize it, then he was competent, and bound to give his opinion, or belief, whether the receipt in question was the writing of the plaintiff. The witness still insisted, that he was unacquainted with the plaintiff's hand-writing, "and did not believe that he could recognize or know it, if he saw it." Here the witness, after being distinctly informed of the character of the examination, and the latitude allowed to his answers, declared his inability to recognize the genuineness of the paper, even according to belief or opinion, and the court was not bound to permit the question to be propounded in a form merely varying in phraseology. If the witness seemed to misapprehend the scope of the inquiry, then it would have been proper, and even the duty of the court to have permitted the examination to be prosecuted in a more intelligible form. But it was doubtless supposed, that no such necessity existed for protracting it, and that the witness had fairly shown himself incompetent. Assuming this hypothesis to be correct, as we must do upon the facts stated in the bill of exceptions, and the rejection of the questions proposed by the plaintiff's counsel, was the exercise of a discretion, which this court cannot revsie. The general rules for the examination of witnesses, must necessarily be so often applied, or relaxed according to circumstances, apparent to no one except the

presiding judge, that a strict uniformity is not at all times to be expected, and in some instances, would prove injurious to the interests of justice. Much, therefore, is confided to the discretion of the judge of the primary court, which, though it should not be exercised by an arbitrary strictness on the one hand, or arbitrary indulgence or relaxation on the other, should always be applied with a due regard to the rights of parties. 1 Phil. Ev. 268.

In respect to the frame of the questions, we cannot perceive that they were objectionable, the witness having first stated, that he had seen the plaintiff write; they seem to have been drawn with studied precision, with the view of informing the witness of the nature of the *impression, belief or opinion*, he was asked to express, and considering how difficult it is sometimes, to make a very conscientious witness understand the line between *knowledge* and *belief*, we think they are not only unexceptionable in point of form, but are in terms most appropriate. It is a mistake to suppose they call for mere impressions, too indistinct to rest a conclusion on; true, they ask the witness to state *impressions*, yet these *impressions* must, in the nature of the subject, amount to *belief* or *opinion*. This proposition seems to us too plain to require illustration. But the defendant had previously asked equivalent questions—both his counsel and the court informing the witness of the character of the examination, and manner in which the answer might be made, and we cannot say that the refusal to permit a repetition of the inquiry, is an available error. Its allowance, or rejection, was a matter within the discretion of the circuit court, depending upon considerations of which it might be difficult to inform us by the record, and which, if informed, we perhaps could not control.

3. The jury are generally the appropriate arbiters of the *quantity* and *measure* of proof, or rather of the *effect* of evidence. It is for the court to intercept such testimony as would tend to prejudice or mislead, beyond this, the law confides in the integrity and good sense of the jury. "In the ordinary affairs of life," says Mr. Greenleaf, "we do not require demonstrative evidence, because it is not consistent with the nature of the subject, and to insist upon it, would be unreasonable and absurd. The most that can be affirmed

of such things, is, that there is no reasonable doubt concerning them. The true question, therefore, in trials of fact, is not, whether it is possible the testimony may be false, but whether there is a *sufficient probability* of its truth; that is, whether the facts are shown by competent and satisfactory evidence. Things established by competent and satisfactory evidence, are said to be *proved.*" *Again:* "None but mathematical truth is susceptible of that high degree of evidence, called *demonstration*, which excludes all possibility of error, and which, therefore, may reasonably be required in support of every mathematical deduction. Matters of fact are proved by *moral evidence alone;* by which is meant, not only that kind of evidence which is employed on subjects connected with moral conduct, but all the evidence which is not obtained from intuition, or from demonstration." Greenl. Ev. § 1, 2d ed. "By *satisfactory evidence*, which is sometimes called *sufficient evidence*, is intended that amount of proof, which ordinarily satisfies an unprejudiced mind, beyond reasonable doubt. The circumstances which will amount to this degree of proof, can never be previously defined; the only legal test of which they are susceptible, is their sufficiency to satisfy the mind and conscience of a common man; and so to convince him that he would venture to act upon the conviction, in matters of the highest concern and importance to his own interest." Id. § 2. *Further:* "Circumstantial evidence is of two kinds, namely, *certain*, or that from which the conclusion in question *necessarily* follows; and *uncertain*, or that from which the conclusion does not necessarily follow, but is *probable* only, and is obtained by a process of reasoning." "In civil cases, where the mischief of an erroneous conclusion is not deemed remediless, it is not necessary that the minds of the jurors be freed from all doubt; it is their duty to decide in favor of the party, on whose side the weight of evidence preponderates, and according to the reasonable probability of truth. But in criminal cases, because of the serious and irreparable nature of the consequences of a wrong decision, the jurors are required to be satisfied, beyond any reasonable doubt, of the guilt of the accused, or it is their duty to acquit him; the charge not being proved by that higher degree of evidence

which the law demands. In civil cases, it is sufficient, if the evidence, on the whole, agrees with and supports the hypothesis, which it is adduced to prove; but in criminal cases, it must exclude every other hypothesis, but that of the guilt of the party." Id. § 13, (a).

In Ross v. Gould, 5 Greenl. Rep. 204, upon the trial of a writ of entry, the genuineness of a deed for the premises demanded, adduced by the tenant, was contested by the demandant, and evidence was offered by both parties, for and against it. Whereupon, the judge instructed the jury, that the tenant having introduced the evidence purporting to be a deed, and claiming under it, it was not the duty of the demandant to prove it to be a forgery; but it was the duty of the tenant to give them reasonable satisfaction that the deed was genuine. And if he had failed thus to satisfy them upon this point, they would return their verdict for the demandant. In the argument in the supreme court, it was insisted, that as the tenant proved the deed by one witness, and it was read to the jury as the deed of the demandant, the *onus* was cast on the demandant to show it was a forgery; and the evidence offered afterwards to this point being contradictory, the jury should have been instructed that it was the duty of the tenant to prove it a genuine deed. The court said, "in the examination of the contested fact, the *onus probandi* may, in the course of a trial, be thrown from one party upon the other several times, according as the complexion of the proof may change. But when it is said, as was stated by the judge at the trial, that the *onus probandi* is on the party who offers a paper as a genuine deed, under which he claims, the plain, sound, common sense and legal meaning is, that it has reference to all the evidence in the cause respecting the alledged genuineness of the contested paper; or, in other words, it means that the party affirming the paper or instrument to be genuine, must furnish to the jury so much evidence, as to leave a balance of proof in favor of the genuineness of the instrument, after making all due allowance for the influence of the proof adduced on the other side to produce a different conviction in the minds of the jury."

In Brooks et al. v. Barrett et al. 7 Pick. Rep. 94, the court said, the "shifting of the *onus probandi* is quite familiar in

the course of trials. In a suit upon a written contract, on the general issue, the plaintiff produces his note, proves the defendant's signature, and stops; the defendant then alledges payment, want of consideration, or other matter in defence, and the burden of proof is upon him."

In the Inhabitants of Attleborough v. the Inhabitants of Middleborough, 10 Pick. Rep. 378, the jury were instructed, that as the amount of the highway tax was not carried to the succeeding year, the presumption was, that it was paid; but that this presumption might be repelled by evidence; that they would consider the evidence in relation to this point, and if the defendants had failed, upon the whole, to satisfy them, *beyond a reasonable doubt*, that the tax was paid, they must find for the plaintiffs. It was contended, in the supreme court, that the instruction ought to have been, that the presumption was conclusive; but the court said, "there was nothing in the statute, and certainly nothing in the circumstances of the case, to render this presumption conclusive. It was evidence, to be weighed and considered by the jury, and they might well consider it as fully counterbalanced by the express negative testimony of the surveyor. The jury were also rightly instructed, that the burden of proof was on the defendants, and that if they doubted of the truth of the fact relied on, to wit, the payment of the tax, the verdict must be for the plaintiffs." In Crail v. Crail, 6 Penn. State Rep. 480, it was adjudged not to be error to instruct the jury, that they should require *clear and satisfactory evidence*, to find a tenancy from parol declarations, when the alledged tenant had a legal title from the commonwealth, and it appeared an ancient agreement, for a sale by him to the landlord had been abandoned.

We may pass over the first charge, and direct our attention to the second; for if the latter can be supported, notwithstanding the stringency of the terms in which it is expressed, it must be conceded, that no objection will lie to the former. In the second charge, the court instructed the jury, "that if the evidence, although it preponderated in favor of the receipt being genuine, still, if upon a fair and full examination of it, their minds were left in a state of doubt and uncertainty as to its being genuine, they should find in favor of the

plaintiff upon that point." This instruction is in very broad and general terms, and does not particularize the nature of the "doubt and uncertainty" which should occupy the minds of the jury, so as to induce them to withhold their sanction from the preponderating evidence in favor of the genuineness of the receipt. The fair inference is, that any degree of "doubt and uncertainty," was sufficient to produce that effect, although it was not the result of the application of the ordinary tests by which truth, or strong and overbalancing probabilities, are evolved from controverted facts. If there was sufficient probability, upon an examination of all the testimony to the point, to convince the judgment, and induce an unprejudiced mind to affirm the genuineness of the receipt, this was enough to incline the scale in favor of the defendant; yet the jury were not left free to act upon evidence thus potent, unless they felt certain beyond doubt, that the conclusion to which they were led, was founded in truth. They were authorized to infer, that *demonstrative evidence* was required, and that *moral evidence* was insufficient. A rule thus stringent would impair, to a great extent, the value of circumstantial evidence—frequently the best that can be obtained, and often the most satisfactory and convincing. It is directly opposed to what we have seen is said by Mr. Greenleaf, whom we all agree is a text writer of great exactness and accuracy. He expressly affirms, that in civil cases, it is not necessary that the minds of the jurors should be freed from all *doubt;* but they should decide according to the reasonable probability of truth, and in favor of the party on whose side the weight of evidence preponderates.

The citation from 7th Pickering lays down no proposition in respect to the *quantum* of evidence, and furnishes no aid in the explication of the question before us. In the case in 10th Pickering, no objection appears to have been taken to the terms in which the charge to the jury was expressed, and the revising court did not consider that point—the only inquiry was, whether a presumption from a given fact was *conclusive*, or could be countervailed by evidence. The decision, then, is worth but little as an authority, for any other purpose than to show what was the effect of the evidence be-

fore the court. In the case from 6th Penn. State Reports, the court certainly were correct in saying it would require "clear and satisfactory evidence" to establish a tenancy in favor of the plaintiff in the absence of a writing, where the alledged tenant had a legal title from the State, which he had conveyed many years previously to the defendant—and when, too, it was shown that an ancient contract for a sale to the ancestor of the plaintiff (the assumed landlord), had been abandoned. The citation from 5th Greenleaf, intimates in no equivocal terms, that a balance of evidence in favor of one party, after giving all due credits to the other, is usually sufficient to authorize the jury to find a verdict in a civil case. The view we have taken, instead of being opposed, is really supported by Starkie. This learned author says, that in criminal cases, a mere preponderance of proof will not suffice —all reasonable doubt must be excluded; but in cases of a civil nature, where no presumption of law or *prima facie* right operates in favor of either party, a mere preponderance of evidence on either side, may be sufficient to turn the scale. True, a mere preponderance, where it falls short of fully disproving a legal right once admitted or established, or of rebutting a presumption of law, is insufficient. "One who seeks to charge another with a debt, must do so by full and satisfactory proof; and on the other hand, where a debt has once been established by competent proof, the debtor cannot discharge himself but by full proof of satisfaction. Again, where the law raises a presumption in favor of the fact, the contrary must be fully proved, or at least such facts must be proved, as are sufficient to raise a contrary and stronger presumption." 1 Stark. Ev. 543, 7th Am. ed. These are legal propositions, well founded in reason. It must be admitted, that when the plaintiff showed a *prima facie* right to recover, it devolved upon the defendant to establish a payment or discharge, "by full and satisfactory evidence;" but the second charge required more than this—it supposed that the defendant should discharge himself by evidence so conclusive, as to exclude "doubt and uncertainty" from the minds of the jury. This requisition, we have seen, was too exacting, and cannot be supported. The judment of the circuit court is consequently reversed, and the cause remanded.

MOBILE AND CEDAR POINT R. R. CO. v. TALMAN AND RALSTONS.

1. Where two mortgagees, one of whom has a mortgage on a part only, and the other on the whole, of the property named in the bill, join as complainants, the bill is not multifarious.
2. The objection of multifariousness, cannot be made for the first time in this court.
3. Where a bill, after alledging, that the M. and C. P. R. R. Co. was indebted to the A. L. Ins. and Tr. Co., and that the former executed to the latter, a note and mortgage, to secure the payment of said indebtedness, avers, that the complainant "is the assignee of the said A. L. Ins. and Tr. Co. of the said indenture of mortgage, and the said promissory note, and entitled to all their rights and remedies, therein and thereupon," &c., this is a sufficient averment of title in the complainant.
4. Where one of several trustees, who have been made defendants to a bill, dies, and another person, *by consent in court*, is substituted in his stead, the irregularity, if there be any, is waived; and if said substituted party appears by attorney, and fails to answer, a decree *pro confesso* may be taken against him, notwithstanding he may not have been served with process.
5. Where an assignment, made by a debtor of all his estate, to trustees and their successors, for the benefit of creditors, reserves to the assignor the right to substitute a trustee, in the event of the death, or refusal to act, of those appointed, and contemplates the exclusive management by the trustees of the interests conveyed, and one of the trustees, being also a *cestui que trust*, dies, pending a suit against the trustees, it is not necessary to revive the suit against the personal representative of the deceased trustee.
6. A corporation is capable of making every species of deed, and, though by special permission in its charter, it is empowered to mortgage its effects for a *particular* purpose, this will not take away, or abridge, its *general* power to execute mortgages for the benefit of creditors.
7. J. B. M., being fully authorized in that behalf by the M. and C. P. R. R. Co., and A. and G. R., enter into a written agreement, by which A. and G. R. engage to act as the agents of said company, and to purchase in England, pay for, insure, and ship to said company, at Mobile, a certain quantity of rail road iron, &c.: and the said company, in consideration thereof, undertake to pay the said A. and G. R. for the same, on its arrival at Mobile, &c., and to secure said payment, "pledges the real and personal estate of said company," to the said A. and G. R. Held—1. That the agreement constitutes an equitable mortgage in favor of A. and G. R. on all the real and personal estate of said company, which a court of chan-

cery will enforce against said company, and all persons claiming under it with notice. 2. That neither the fact, that the agreement pledges the real and personal estate of said company, without specification, nor that the amount to be secured is not stated, nor that it is made to secure future advances, nor that no time of redemption is fixed, can, *per se*, render the agreement invalid.

8. Where an agreement is entered into between A. and G. R., and the M. and C. P. R. R. Co., by which A. and G. R. engage to purchase, pay for, insure, and ship to said company at Mobile, a certain quantity of rail road iron, &c. as a condition precedent to the liability of said company, in a bill filed by said A. and G. R. against the said company, to enforce said agreement, it is averred, "that there is now due to them from the company, the sum of $7,000, and upwards, accruing to them under the contract, and that they proceeded to purchase the iron, and furnished it to the company, according to the stipulations of the contract, having advanced the money therefor," this is a sufficient averment of performance.

9. Where a bill filed by T., and A. and G. R., against the M. and C. P. R. R. Co. and *others*, to foreclose a mortgage executed by said Co. to T. on a certain lot of land, and an equitable mortgage, executed by said Co. in Philadelphia, to A. and G. R., on "the real and personal estate" of said company, to secure debts due by it to T., and A. and G. R., respectively, after describing three parcels of land owned by said company at the time of the execution of said equitable mortgage, avers, "that the company was also possessed of large quantities of iron of various descriptions, steam engines, cars, and various other chattels, which were pledged by said contract," to A. and G. R: "that M. D. E. had converted the said chattels, or a large portion of them, to his own use, by selling the same, and receiving the proceeds thereof:" and the register, under a reference by the chancellor, reports a certain sum due to T. on the 1st January, 1847, and another sum due to A. and G. R., on the 31st December, 1843, subject to two credits of subsequent dates, and that these sums must draw interest to the 10th April, 1847, the time of the report: and the chancellor thereupon orders and decrees, that the "defendants" pay the amounts so reported, into the hands of the register, by the first day of May next thereafter, and on their failure to do so, the register shall proceed "to sell the property described in complainants' bill, and mortgages and exhibits, or so much thereof as shall be necessary to satisfy the complainants' debts and interest, and costs of suit," &c. The decree is erroneous—1. Because it is incomplete. 2. For want of certainty.

10. If two mortgagees of the same property, file a bill to foreclose, a subsequent assignee of the property has no right to object that the senior mortgagee yields his priority of lien to the junior mortgagee.

11. Are not the stockholders in a corporation, which has by its regularly authorized agents created a lien on its effects in favor of a third person, estopped from asserting a lien created by said corporation in their favor? *quere.*

Error to the Court of Chancery of the 1st District. Before the Hon. A. Crenshaw, Chancellor.

THIS was a bill filed by the defendants in error, against the plaintiffs in error. The facts, &c. are so fully set out in the opinion of the court, that it is unnecessary to state them here. The chancellor decreed in favor of defendants in error.

STRWART, for plaintiffs in error.

1. The bill is multifarious. Two mortgages are joined in one bill. They are made to distinct parties, at different times, one embraces property which is not in the other—to litigate one, parties are necessary, which are not as to the other, and one of the complainants has no interest in a part of the property in litigation, and is joined with one who has. 6 Paige, 28; 5 Ib. 65; 3 Ib. 336; 1 Daniel's Pr. 383-4, 347; Story's Eq. Pl. 509, 551, 554. The court may, *sua sponte*, dismiss the bill for multifariousness. The deficiency of the bill was brought to the notice of the court below, and the court should have refused its decree on it. Story's Eq. Pl. § 284; 10 Ohio Rep. 456; 1 Daniel's Eq. Pr. 397.

2. The averments in the bill are too loose, vague and indefinite. The facts are not averred with sufficient precision, to show that the complainants have a right to a decree. A complainant must show his right clearly. 1 Daniel's Ch. Pr. 360. The averments must be positive. Ib. 411. Every thing intended to be proved, must be averred in the bill. Ib. 377. Certainty is required. Ib. 421-2. And every requisite fact must be shown, which is necessary to complete the complainant's title. 1 Story's Eq. Pl. § 257, 258; 1 Dan. Pr. 369. To show the right of Talman as assignee, the fact of the assignment must be averred, and it must be shown how it was assigned, so that the court may see that it was a lawful assignment, else judgment cannot be given on it. McKinley v. Irvine, 13 Ala. 681. And it must be averred that the assignment was in writing. 1 Dan. Pr. 419, 420. And under seal—and must appear to be a valid assignment. 15 Mass. Rep. 236; 5 Halst. 156; 5 Wend. 575.

3. A mortgage may in some cases be held to secure future advances, but it is by tacking to existing debts, secured by

mortgage already. 4 Kent's Com. 175; 4 Conn. R. 158; 6 Ib. 37.

4. The bill makes the attempt falsely to give precedence to the mortgage of Talman, when it is evident that if the lien of Ralston is a good one, it must have precedence over that of Talman. The decree pursues the same order of payment, and it is therefore erroneous in that respect.

5. The proper parties are not before the court, and therefore, no proper decree could be rendered, and the cause must stand over for proper parties. The bill does not charge a conveyance of title from the trust company of Talman's mortgage; the legal title is therefore in the trust company. No proper decree can be made, unless the legal title be before the court, so as to be bound by the decree, and disposed of. An assignment of a mortgage does not carry the legal title to the land. 11 Wend. 533. The trust company should therefore be made a party to the bill. The mere naming a party as a defendant, does not make him a defendant. 1 Dan. Pr. 334; 2 Dick, 707; 1 A. K. Marsh. 594. To make parties, the bill must be amended, with apt and proper words to charge them. 1 Dan. Pr. 341.

6. The decree was not a proper one. It reverses the proper order of priority, by decreeing payment of Talman first. It does not ascertain what the property is which is subject to sale. How does it stand as to the personal property? It does not allow the redemption of one mortgage separately. It makes no disposition of the fund in the hands of Eslava, and does not ascertain the amount of it. It subjects the whole of the property in the bill, mortgages and exhibits described.

Hamilton, contra.

The point, I call the attention of the court to first, is the fact, that none of the defendants answered, or demurred to the bill below, or made any objection to it, till after a decree had been rendered, when the plaintiff in error for the first time began to move, and petitioned the chancellor for a rehearing, and that the bill be dismissed. This court will not therefore lightly disturb the decree and proceedings below; but will make all proper necessary intendments to support

them: in this state of facts, this case is to be examined. Does the record, then, show a right in Talman to the relief he seeks? He alledges that he is the assignee of both the note and the mortgage; the presumption is, the allegation was proved to the satisfaction of the chancellor. The bill was takeu *pro confesso* against the defendants. The presumption then is, that Talman possessed all the rights given by the mortgage, and that he holds the same by a valid legal assignment. To decide the contrary, would be to decide on a presumption only, and against the record—in other words, it would be to presume error in the court below, which this court never does. 3 Ala. 458; Emanuel et al. v. Hunt, 2 Ala. 191; Ib. 415. And the original mortgagee having parted with all interest in the mortgage, is not a necessary party. Walker v. B'k Mobile, 6 Ala. 452.

The same presumption must be made in favor of the fact of the indebtedness of the rail road company to Messrs. Ralston. The bill is taken *pro coufesso:* the fact and amount of this indebtedness is found by the master's report, which was confirmed by the chancellor, without exception taken, after the time prescribed by the sale. It is too late to make the objection for the first time in a court of errors, when it was not made, or hinted at below.

The complainants, Ralston, contracted for a lien as their security; and such was agreed to be given, and was given, by the rail road company; and that their claim is that of equitable mortgagees. The agreement and resolutions speak of a pledge, it is true; and strictly speaking, there can be no pledge of real property. The charter of the company uses the word pledge, when speaking of both real and personal property. Acts 1835, p. 83, § 8. The word "pledge," must be something that can be done. Equity is not confined to the strict and technical meaning of words—it looks beyond, and seeks the meaning of the parties.

No one can hesitate as to the object of the parties here—on the one side, it was to purchase articles necessary to the company, on the security of their property, and on the other, it was to sell or procure for the company, those articles, on the faith of the lien offered by the company.

Even on the ground assumed by the counsel for the plain-

tiff in error, that this is an agreement for a mortgage only, which would authorize the party to demand a mortgage, the complainants, Ralston, are entitled to the relief sought, upon the principle, that equity always regards that as performed, which was agreed to be done. 1 Story's Eq. 79, 80; and see Hankey v. Vernon, 2 Cox R. 12. And being in a court of equity, the Messrs. Ralston call for the application of the rule in their case. They parted with their property on the faith of a lien which was given them; or if the counsel please, which was agreed to be given them, their property was received by the company, used by it, and finally assigned to the plaintiff in error and others, who were stockholders and directors of the company, and must be supposed cognizant of the facts. Here was an express written agreement for a lien, or mortgage: such an agreement constitutes an equitable mortgage. 1 Bro. C. C. 352.

A written agreement, promising to pay a sum of money, with interest, "of the estate of the deceased W. H," and signed by the parties in interest, is an equitable mortgage. Stuart v. Toulmin, cited 3 Powell on Mortgages, 1049, a—tit. Eq. Mortg. *quod vid.*; and see Burn v. Burn, 3 Ves. 582; s. c., 2 Sch. & Lef. 381; 2 Powell Mortg. 435, 522; 2 Des. Eq. R. 552; 2 Cox R. 12; 1 Ib. 211. 12 Vesey R. 197, et seq., in which the Master of the Rolls, (Sir William Grant,) though strongly condemning the English doctrine of mortgage by deposit of title deeds, clearly recognizes the rule contended for, and says, "if any act appears so unerringly speaking its purpose, that a court could infer and execute such purpose, without the aid of extrinsic testimony, a written declaration of the purpose might appear altogether superfluous." Here is a written declaration, and made under the instructions of the company, and by an authorized agent, and fully declaring the intention to pledge or mortgage; in other words, to secure this debt by a lien.

Here, though there is no description of the land, there is much better notice of the existence of a lien, than the record of a judgment would furnish; and this agreement is spread upon the records of the county in a form much more likely to get to the knowledge of a creditor, than the record of a judgment.

But this is not a contest between creditors. The party objecting is one of the stockholders, and a director of the company, and is one of the general assignees of the company: such assignees or trustees are not such purchasers or creditors, without notice as the law will protect—they stand in the place of the assignor, and can claim only such rights as the assignor had. 1 Paige's R. 125; 11 Ala. 1080; 1 Ired. E. 369.

The right of the Ralstons in this case, cannot be attacked, because of the want of description of lands mortgaged and debt to be secured, in the agreement. I am aware that two or more cases can be found in Connecticut ruling this, (4 and 5 Conn. R.) but those cases cannot be binding in this case, for two reasons. 1. The controversy in each of those cases, was between two sets of mortgagees. The defence was made by the subsequent mortgagee, that the description was too indefinite, and the policy of the registry laws was invoked to sustain the objection; the objection could not have been permitted to be made by the debtor and mortgagor. As to him the mortgage was binding, whether registered or not. So here, the lien is binding as to the company, and its general assignees. (Vide cases supra.) This case then is widely distinct from the cases in Connecticut.

2. Another reason, why those cases should not govern, is this. The doctrine of this court, with regard to deeds for the benefit of creditors, is that the want of the description of the debts to be secured, and of the property conveyed, shall not, of itself, invalidate the deed. The want of this description may, in connection with other circumstances, raise a suspicion of fraud, but of itself it works no injury. Wiswall v. Ticknor & Day, 6 Ala. 178; 5 ib. 324; see Duval's heirs v. McLoskey, 1 ib. 708.

In this case, though there is no description of the land, there is a description of the consideration of the agreement—the debt to be provided for.

Neither is the lien of the Ralstons void, because it was given for future advances. The Connecticut cases do not decide that a mortgage may not be given, and be valid as between mortgagor and mortgagee, for future advances; but that as to subsequent mortgagees, under the registry laws of

the State, it was void. Mortgages may be well executed to secure future debts. 5 Binn. 585; 7 Cranch, 34; 1 Pick. 389; 2 Cowen, 246; 1 Peters, 448. In England, an equitable mortgage by deposit of title deeds, may be made to secure future advances. 3 Powell on Mort. 1056, c. d. et seq.

An equitable mortgagee may file a bill to establish his lien, and for a sale of the property. 3 Pow. 1060, a. And such is the object of this bill. Vide Burn v. Burn, 3 Vesey, 582, quoting Stewart's case, and s. c. 2 Sch. & Lef. 380; and will be preferred to a legal mortgagee with notice. 3 Powell, 1058, a.

The claims of both Talman and the Ralstons, are superior to those of Portier. Portier and his co-trustees claim by virtue of the voluntary assigument of the company to them, to secure themselves and others, all members of the company, for liabilities they had come under. They therefore have, and can here set up, only the right remaining in the company after the conveyances held by Talman and Ralstons. They must have had notice, being members of the company. Howe's case, 1 Paige, 125; Miller & Co. v. Walker, 11 Ala. 1080.

Whether the bill be multifarious or not, it is too late for the defendants to make the objection in this court. That should have been done below, on a demurrer. The objection is never favored, nor admitted even, in an appellate court. The petition for re-hearing of the cause, and for dismissal of the bill, was too late. The objection must be taken before the hearing—but this was an attempt to obtain a re-hearing only to make the objection. 10 Yerger, 383; 10 Gill & J. 480; 2 Ib. 14; 10 Ala. 305; and see Kennedy v. Kennedy, 2 Ala. 571; and 5 Ala. 402. And even if not too late, the objection must be very glaring, to induce the court to sustain it. Whitney v. Whitney, 5 Dana, 329. The objection even on demurrer would not be well taken. Two mortgagees may join in one bill. Wendall v. Wendall, 3 Paige, 509.

The decree of the chancellor, as to interest, is not erroneous; for it can be rendered certain by reference to the contract, and the law of the State, on the subject of interest in other States. Vide p. 80 and 468, Acts of 1847-8.

CHILTON, J.—This bill was filed by George F. Talman, Ashbel Ralston and Gerard Ralston against the Mobile and Cedar Point Rail Road Company, Miguel De Eslava, Alexis D. Durand, and Michael Portier, and charges that on the 19th June, 1839, the Mobile and Cedar P. R. R. Co. being indebted to the American Life Insurance and Trust Co., a corporation situate in the State of Maryland, in the sum of $5,810 50, the better to secure the same, executed to said Trust Co., of that date, a mortgage, granting to said Company certain real estate in the city of Mobile, to secure the payment of said indebtedness, which was evidenced by note, due the 16th day of June, 1840. That Talman is the assignee of said note note and mortgage, which remains unpaid, and the mortgage has become forfeit.

A. and G. Ralston represent, that on the 16th July, 1836, the Mobile & C. P. R. R. Co., by resolution passed on the 14th July, 1836, authorized one Moore to pledge all the real and personal estate of said company, in procuring for said company by contract, iron, locomotives, tenders, cars, &c. That Moore applied to said A. and G. Ralston to furnish the iron, and offered to pledge the company's real and personal estate for any advances they might make. That they (A. & G. Ralston) did agree to furnish the iron upon the pledge by Moore of all the real and personal estate of the company, and on the 31st August, 1836, said Moore, by virtue of a resolution of the corporation, and a letter from the president, secretary and treasurer thereof, requesting him to conclude the purchase, and authorizing him to pledge the estate of the company, entered into a written agreement, signed by him and A. and G. Ralston, by which the Ralstons as agents of the company, agreed to purchase and pay for a certain amount of rail road iron in England, and caused it to be insured and shipped to Mobile, and the Mobile and C. P. R. R. Co. agreed "to pay to their said agents, the said A. and G. Ralston, or order, in cash, in Philadelphia, or equivalent thereto, at the rate of exchange on London, at which the Bank of the United States at Philadelphia may be then drawing, upon the arrival of the iron at Mobile. The bills for the same, including one per cent. banker's commissions, and interest from the time of payment in England, up to the time

requisite to reimburse the same in London, at the rate of six per cent. per annum; together with a commission of five per cent. on the amount of the invoice, and charges for purchasing and shipping the said iron." The agreement then states, "for the faithful performance of this contract on the part of the Mobile and C. P. R. R. Co., the said J. B. Moore, engineer for said company, pledges the real and personal estate of said company, as authorized to do by the instruction of F. Ravisies, president, A. J. Durand, secretary, and A. C. Hollinger, treasurer, committee appointed on the 16th day of July, 1836, to purchase materials for said road, as per documents annexed. Dated at Philadelphia. (Signed,)

J. B. Moore,
A. & G. Ralston."

The Ralstons then aver, that there is due to them, and unpaid from the company, on account of the purchase of iron under said contract, the sum of $7,000 and upwards, accruing under said contract. They charge, that in addition to the real estate embraced in the mortgage, which comprises a lot of about one acre, in the city of Mobile, the company owned at the time of the agreement, and which they alledge is subject to their equities, a tract of land, situate on Mon Louis Island; containing fourteen hundred acres, and which the bill particularly describes, besides another tract, which is described as containing sixteen hundred and fifty acres. These complainants (A. and G. Ralston) insist that the company were also possessed of a large portion of iron, steam engines, cars, &c., which were pledged by said agreement. Complainants charge, that Miguel D. Eslava has converted said chattels, or a large portion thereof, to his own use, having a full knowledge of the complainants' equities. That said company, using the name of the Mobile and New Orleans Rail Road Company, on the 9th January, 1840, conveyed all their before mentioned estate to Michael Portier, Miguel D. Eslava and Alexis D. Durand, with full power to sell and dispose of the same, the proceeds of the sale to be applied to the payment of certain debts due from the company to certain of the stockholders thereof. That these persons took the conveyance with a full knowledge of complain-

ants' equities, and that said conveyance was executed in subjection to their prior lien. That Eslava also claims to hold a portion of said estate under a purchase at sheriff's sale, but they charge his right is subordinate to theirs. The bill prays an account to be taken of the amount due on the mortgage of Talman, and to A. and G. Ralston. That Talman's mortgage be foreclosed by sale of the property—the surplus, after satisfying his demand, to be applied to the payment of Ralston's claim. That the other estate of the company be sold, the equity of redemption of all parties be foreclosed and barred, and that Eslava bring into court the sums he may have received from sales made of said personal estate; that the same be paid on Ralstons' demand.

By a resolution of the company, a copy of which is exhibited with the bill, it appears, the persons who wrote the letter to said Moore, requesting him to procure the materials, &c. for the road, were appointed a committee to procure said materials, with power to make an agent or agents, to effect the object proposed.

The deed of trust under which the defendants below claimed, was executed to Michael Portier, Miguel D. Eslava and Alexis D. Durand, the 9th January, 1840, and purports to have been done by resolution of the board, entered into the day previous to its execution, which recited that the company, having failed to negotiate a loan, by virtue of a previous resolution, to meet the exigencies of the company, did, on the 7th July, 1837, resolve that the real and personal estate then belonging to it, should be pledged to indemnify and save harmless, such of the stockholders as should, from time to time, lend their names to the company, for the purpose of raising money for its use. That in virtue of this last resolution, F. Ravisies and Alexis D. Durand, on the 10th July, 1837, executed their note, payable to, and indorsed by M. D. Eslava, for $3,000, which was negotiated in the Branch of the Bank of the State of Alabama at Mobile, and the proceeds applied to pay off the debts of the company. Another note, made about the same time, was negotiated and applied in the same manner, made by E. De Vandell and Durand, and indorsed by M. Portier, for $200. A third note discounted at the Bank of Mobile, and the proceeds in like

manner applied, was made by M. Portier, payable to, and indorsed by S. H. Garrow, and further indorsed by Durand, Joseph Hall and M. D. Eslava, for $5,000. A fourth note, made by Eslava, and indorsed by Isaac H. Erwin and A. S. Dumee, discounted at the Planters' & Merchants' Bank of Mobile, dated 28th July, 1737, and due at ninety days, was applied to the payment of the company's debts. The resolution further recites, that F. Ravisies, being president of the company on the 22d August, 1837, drew a draft on the company, and accepted it as president thereof, in favor of, and indorsed by Eslava, and also indorsed by Durand, payable at New York, the 15th March, 1838, and purchased by Geo. Poe, jr. and the proceeds thereof ($5,000) applied to the extinguishment of the debts of the company. These demands not having been settled by the company, it was ordered that this deed of trust be, and the same was accordingly given, to secure, and save said parties harmless, &c.

Pending the suit, at the spring term, 1844, the death of Durand was suggested, and a *scire facias* issued to Julius Delchamps, his executor, which was duly executed the 4th February, 1845. In April, 1845, an order of the court was made by consent, appointing Adrian S. Dumee, trustee under the deed to Portier, Eslava and Durand, to act in the place of Durand, deceased, and to represent the trust in this cause. In April, 1846, the bill was taken for confessed against Portier and Eslava, on personal service. In December, 1846, Messrs. Stewart & Easton came into court and entered an appearance for all the defendants, except M. D. Eslava. Afterwards, on the 6th April, 1847, a decree *pro confesso* was entered against the rail road company, Eslava, Portier and Dumee, the entry reciting, that "the mortgage and notes being produced and proved, are, with the bill, referred to the master to ascertain, and report the amount due, and to state the amount between the parties. The master having reported as due to Talman, on the 1st January, 1847, the sum of $4,528 40, and to the Messrs. Ralstons, on the 31st December, 1843, $7,832 04, upon which had been paid, April 22, 1844, the sum of $4,041 20; and on the 29th May, 1845, $681 11, with interest on the respective items up to 8th April, 1847. The chancellor then confirmed the report,

and decreed finally, that unless the defendants should pay into court the amount so ascertained by the master, by the 1st May following, the register should proceed to sell the property described in the complainants' bill, and mortgages and exhibits, or so much thereof as may be necessary to satisfy the complainants' debts, with interest and cost of suit, to be sold at the court house in Mobile county, at public auction, between the usual hours of sheriffs' sales, due and legal notice thereof being given by publication, &c.; "and out of the proceeds of such sale, he will pay and satisfy the complainants' debts, in the order pointed out in the bill, with interest, and the costs of suit, and any balance that may remain, he will bring into court to abide its future order.

At the same time, a petition for a re-hearing was filed, by which M. Portier avers, "that he has a meritorious defence to the bill, which from circumstances, he was not able to present before the decree was made; that the execution of the decree would be highly injurious to him; that he is advised the bill is defective, and bad on demurrer, and that the court should dismiss it for want of equity, upon being advised as to the defects appearing on its face, &c. The court refused to open, or set aside the decree. It does not appear that any process of subpœna was ever served upon Alexis D. Durand, or that Dumee had been made a party, otherwise than by the order appointing him trustee in place of Durand. The defendants, having brought the case to this court by writ of error, now insist that the decree is erroneous: Because—

1. The bill is multifarious.

2. The allegations of the bill are too indistinct, and uncertain, to justify the decree.

3. The court erred in rendering a decree *pro confesso* against A. S. Dumee, when he had not been made a party defendant, by any allegation of the bill.

4. That no decree should have been rendered, without a decree *pro confesso* against Delchamps, on whom process had been served as the executor of Durand.

5. That the decree is uncertain—it does not ascertain what property shall be sold—who has it, nor how much of it.

6. The decree omits the value of the property converted by Eslava to his own use, and makes no disposition of it.

7. The decree determines that the claims of complainants are paramount to the deed of trust under which the plaintiffs in error claim, when, it is insisted, the face of the bill shows the contrary.

8. The decree does not ascertain the amount to be paid, nor establish the rate of interest to be calculated.

9. The decree is against the Mobile and Cedar Point Rail Road Company, whereas the style of the company has been altered by an act of the legislature to that of the President and Directors of the Mobile and New Orleans Rail Road Company.

We will notice these assignments in their order; and

1. We regard the bill as not obnoxious to the objection of multifariousness. The Ralstons assert a lien on all the property, while Talman only claims a portion. It is conceded by the bill, that the lien of the latter is to be preferred, but the Ralstons will take the surplus, if their claims succeed, so that in respect to the lot on which Talman's mortgage creates a lien, the complainants have a common interest, and the defendants claim the whole. The principle involved is not unlike the point decided in Donalson's ex'r v. Pope & Posey, 13 Ala. Rep. 752. See also Wendell v. Wendell, 3 Paige, 509. If, however, the objection were available, it cannot be made for the first time in this court. It is a matter of form, not usually affecting the merits of the decree, and is always discouraged by the courts, when it tends to impede, rather than promote, the ends of justice. Kennedy's heirs v. Kennedy's ex'rs, 2 Ala. Rep. 571; Chapman v. Chunn, 5 Ala. Rep. 397; McGowan et al. v. Br. B'k of Mobile, 7 Ala. Rep. 823-8; 1 Dan. Ch. Pr. 350, and authorities in note 2; Sto. Eq. Pl. § 544, and notes. It must be pointed out by demurrer, or is considered as waived. Welborne et al. v. Tiller et al. 10 Ala. Rep. 310.

2. It is certainly true, as an elementary principle of equity pleading, that the plaintiff must show clearly, by his bill, that he has a right to the thing demanded, or such an interest in the subject matter of complaint, as gives him a right to institute a suit concerning it. 1 Dan. Ch. Pr. 360; Story's Eq.

Pl. § 23; McKinley et al. v. Irvine, 13 Ala. Rep. 693. It is supposed by the plaintiffs' counsel, the averments in the bill as to Talman's title, are not in conformity to this rule. The bill, after charging the indebtedness of the Mobile and Cedar Point R. R. Co., to the American Life Insurance and Trust Co., and the execution of a note and mortgage to secure the payment of that indebtedness, states, "that he (Talman) is the assignee of the said American Life Insurance and Trust Co., of the said indenture of mortgage, and the said promissory note, and entitled to all their rights and remedies, therein and thereupon," and an exhibit is made of the mortgage, which is made part of the bill.

This averment of title is sufficient. The defendants are fully advised of the facts constituting the claim, or title of the plaintiff—he derives his title from the mortgagee directly by assignment. The case of McKinley v. Irvine does not in the slightest degree militate against this proposition. In that case, the plaintiff derived his title to three shares of stock by purchase from the *heirs and distributees* of one James Montgomery, deceased. That title was put in issue. He then attempted to sustain his bill, by proof of a title derived from James Montgomery by his vendors, not as heirs and distributees, but by virtue of the will of said Montgomery, as devisees. This title, we held, was not put in issue by the pleadings; that proof of a will was without the issue, and the plaintiff could not recover upon a title not averred. The case at bar is wholly dissimilar.

It is however said, that the plaintiff should have averred the assignment was by writing, and we are referred to 1 Daniel's Pr. 419, 420. The authority merely affirms, that where a thing is originally created by statute, and required to be in writing, it must then be stated, with all the circumstances required to render it valid. Such, for example, as a title to lands claimed by *devise*, (which, by the common law, was not valid,) must be alledged to have been devised by writing, which is the only form the statute recognizes as valid. But it is a well settled rule, both at law and in equity, that where the act averred might originally have been done at the common law by parol, and the statute requires it to be in writing, the form of pleading it is not affected by the stat-

ute, but remains the same as before the passage of the act. 1 Dan. Ch. Pr. 416; Stephens's Pl. 313. Now, as an equitable interest in a *chose in action*, as well as the legal title to real estate, could pass at the common law without writing, it follows, that to aver an assignment of the note and mortgage by the payee and mortgagee to the plaintiff, is sufficient. If the statute requires writing, then the party must in his proof, exhibit a compliance with its requisitions, if such proof be demanded by the opposing party. In the case before us, the defendants, by their default after personal service, admit the assignment by the payee and the mortgagee, of the note and mortgage, and that the complainant thereby acquired all the rights and remedies which originally vested in the said American Life Insurance and Trust Company. Having been tendered the opportunity of raising all questions respecting the legality or formality of the assignment, and failing to do so, but permitting the decree to pass without objection, it is too late for the defendants to say, it *may* be, the assignment was irregular, or informal; it *may want* the seal of the corporation to render it valid, &c. 5 Ala. Rep. 173.

3. There was no necessity for amending the bill making Dumee a party in the place of Durand, who had died. He was admitted, upon the motion of Portier and Eslava, the two surviving trustees in the deed of trust to them by the rail road company, "to act with them, and to represent the trust fund before the court in this case, as a defendant." The record shows this order was made by consent, and any irregularity, which might otherwise render the appointment erroneous, is consequently waived. 4 Por. 245.

Having appeared by counsel, and failing to answer within the time prescribed by the rules of court, there was no error in taking the bill for confessed against Dumee.

4. The bill prays that Durand may be made a party defendant. No process was ever served upon him, and although a *scire facias* was issued, and was served on Delchamps, as his executor, no other steps were taken to make him a party, and it is very clear, that under such circumstances, he cannot be regarded as a party to the bill. 1 Dan. Ch. Pr. 341. It is true, that upon the decease of a sole trustee, his interest passes to his executor, and if suit be instituted by such trus-

tee, it should be revived in the name of the executor. Mauldin, Montague & Co. v. Armistead, ex'r, 14 Ala. Rep. 702. In this case, two of the trustees survive, and the deed authorizes the company to substitute a trustee in the event of the death, or refusal to act, of those appointed. Upon Durand's death, Dumee was, as we have said, appointed trustee in his place, not, it is true, by a formal resolution of the company, but by its consent in court, which consent operates as an estoppel, so far as respects his appointment.

The deed transfers to the trustees, and their successors, the exclusive management of the property conveyed, and they must be regarded as representing the interest of the *cestui que trusts.* Such being the case, the decision in Walker et al. v. Miller & Co. 11 Ala. Rep. 1086, is in point to show, that the *cestui que trusts* need not be made parties. Durand was not made a party as *cestui que trust,* but as trustee, and his place has been supplied by the substitution of Dumee. There was, then, no error in failing to revive against his executor.

5. We come next to consider the objections to the decree, as presented by the five remaining assignments of error. And before taking them up *seriatim,* let us determine the right of the Ralstons (so strongly contested by the counsel for the plaintiff in error) to any decree foreclosing what is termed by their counsel, their equitable mortgage.

It is proper, in the first place, to remark, that the term "pledge," as used in the charter of the rail road company, as well as the resolutions passed by it, and the agreement entered into by its agent, Moore, should not be construed in its technical sense, as a mere right to deposit its effects in pawn for the security of its creditors, but should be understood in the more enlarged sense, of conferring the power to create liens upon its estate, both real and personal, for the security of demands which should exist against it. It is manifest, the company could not have carried out their enterprize, if the property were required to be delivered over to those who might advance money for the purpose of erecting the road; so that the idea of a *pledge,* technically so called, which requires a delivery, is opposed to the object and design, both of

the company in obtaining loans, and of the legislature in conferring power to secure their re-payment.

It is insisted, that the claim of the Ralstons is not sufficient to warrant a decree in their favor; that the agreement entered into by Moore, as the agent for the company, is not a mortgage; that it is not sealed. It is most certainly not a technical mortgage, which must convey the land from the debtor to the creditor, as a pledge and security for the payment of a sum of money borrowed, and which contains a proviso that the conveyance is to be void on the payment of the money, and interest, on a certain day. But a court of equity will look to the intention of the parties, to be gathered from the instrument, rather than to its form, and will give effect to that intention, if lawful, and it may do so without interfering with paramount equities. The resolution of the board of directors, appointing a committee to negotiate for the iron, &c. for the benefit of the rail road company, fully authorized that committee to appoint an agent to contract for the articles specified in the resolution, and to pledge the real and personal estate of the company, for the fulfilment of the contract. This the agent in good faith did, and on the assurance of his written pledge, of all the personal and real estate belonging to the company, the Messrs. Ralstons furnished the iron to construct the road. The company received the iron under this agreement, without objection, so far as we are advised by the record, to the acts of its agent, Moore. Having availed itself of the benefit of the contract, it would be repugnant to the plainest dictates of justice, to permit it now to say, the contract is invalid—it wants the formality of a seal—it purports to be a *pledge*, and is void, without delivery—the agent transcended his authority, in vesting in the Ralstons too great a latitude, as to the price to be paid for the articles, &c. Without intimating that any of these objections could have been successfully urged at any time against the validity of this contract, it is most certain, that the company must be deemed to have waived them, when, after a knowledge of the negotiation, the articles contracted for, and secured by the pledge, were received and used by the corporation. This would seem necessarily to result, unless indeed corporate bo-

dies are not bound by the same legal and moral obligations which are imposed upon individuals—a proposition which we are by no means prepared to admit.

But it is insisted, this agreement of the company with the Ralstons cannot be decreed an equitable mortgage, because it is not sufficiently specific, being of *all* the property, both real and personal, of the corporation. This objection does not *per se* render the agreement invalid. A sweeping conveyance of all one's estate, is certainly a badge of fraud, but in this case, no fraud is alledged. The same may be said respecting the uncertainty as to the amount to be secured by the deed, and that the security is for advances to be made *in futuro*. The doctrine is well settled, that a mortgage may provide for future advances. Mr. Justice Story, in delivering the opinion of the court in Conrad v. the Atlantic Insurance Company, 1 Peters's Rep. 448, says, "mortgages may as well be given to secure future advances and contingent debts, as those which already exist, and are certain and due. The only question which arises in such cases, is, the *bona fides* of the transaction." So in England, it has been repeatedly held, that an equitable mortgage created by deposit of title deeds, may be extended so as to cover further advances. See the cases referred to in 3 Powell on Mort. 1056. See also, as to what will constitute an equitable mortgage, the case of Stewart v. Toulmin, decided in 1822, in which the Vice Chancellor of England held that a written instrument, promising to pay a sum of money, with interest, "out of the estate of William Hall," and signed by the parties entitled to the estate, created an equitable mortgage upon the real estate of W. H., after the personalty had been exhausted. Vide 3 Powell Mort. 1049, b.

So also, agreements to mortgage may be implied from defective assurances between debtor and creditor, lender and borrower. Dale v. Smithwich, 2 Ver. 151; Card v. Jaffray, 2 Sch. & Lef. 374, cited, 3 Powell on Mortg. 1050, a.

We conclude, from the general principles of equity applicable to such defective conveyances or contracts, when the design of the parties is manifest, as also from the foregoing authorities, and the decisions of this court, which hold that inaccuracy of description, either as to the debts secured, or

property conveyed, does not invalidate the deed providing for the security of creditors, but merely furnishes an argument of fraud against them, that the contract before us should have the effect of an equitable mortgage against the company, and those who purchase with a knowledge of the existence of such lien. This knowledge is directly charged against the plaintiffs in error by the bill, and admitted by their default. See the authorities of this court, cited on brief of defendants' counsel. See also, Robinson and Caldwell v. Mauldin, Montague & Co. 11 Ala. Rep. 980-1. It is true, as insisted on by the counsel for the plaintiff in error, that the capital stock of a corporation is pledged for the payment of its debts; that is, it is regarded as a trust fund, upon the faith of which the company obtains credit, and may be subjected in a proper case in a court of equity, where the rights of all the creditors will be protected, who choose to come in and participate in the litigation. Ang. & Am. on Corp. 475, et seq.; Vore v. Grant, 15 Mass. Rep. 505; Wood v. Dummer, 3 Mason's C. C. R. 308. In the case last cited, Judge Story says, "the bill holders and other creditors, he considered had the first claims upon it; and the stockholders had no right, until all the other creditors were satisfied." He further held, that the trust fund might be followed into the hands of any person having notice of the trust, and that the stockholders, both in law and fact, must be considered as having the *most ample notice.* But it does not result from this, that the corporation may not execute a trust deed, or mortgage. It is laid down as a general rule, without exception, that corporations at this day are capable of making every species of deed. Ang. & Am. 153. So in Allen v. the Montgomery R. R. Co. 11 Ala. Rep. 437, this court held, that although a corporation, by a special provision in its charter, is empowered to mortgage its effects, for a particular purpose, this will not be construed as taking away or abridging its general power to execute mortgages for the security of creditors; and that case also shows, that an insolvent corporation may execute a valid mortgage, or trust assignment of all its effects, to secure the payment of certain bonds, to be afterwards issued for the purpose of raising money for the uses of the company, and that the *bona fide* holders of such

bonds, who had become such before other creditors had acquired a lien, were to be protected, and preferred to such creditors. The sixth head note of the case from which we have quoted, would indicate a different conclusion. This results from a typographical error; the word inoperative, being misprinted, "imperative," which entirely changes the sense.

It is furthermore insisted, that the agreement entered into between the Ralstons, and Moore, as the agent of the company, does not ascertain the debt. The property to be purchased, and paid for by the Messrs. R's, was described, and not knowing what it would cost, the amount could not have been more specifically stated, but being contingent as to amount, could not constitute an objection to a security by mortgage. See 1 Peters's Rep. 448, *supra.* Neither is it an available objection, that no time is fixed for redemption. In all such cases, the law affixes a reasonable time. We are also of opinion, the averments of the bill are sufficient, as to a compliance on the part of the Ralstons with the contract, and the amount they expended in the purchase of the iron. They charge, "that there is now due to them from the company, the sum of $7,000 and upwards, *accruing to them under the contract,* and that they proceeded to purchase the iron, and furnished it to the company according to the stipulations of the contract, having advanced the money therefor, &c.

6. Having ascertained that the agreement entered into with the Ralstons, must, according to the established doctrine of the court of equity, have the effect of an equitable mortgage, we proceed with the objections to the decree, in the order proposed. It is insisted, that the decree is uncertain; that it does not ascertain what property shall be sold—who has it in possession, nor how much of it shall be exposed to sale; that it does not ascertain the amount to be paid, nor establish the rule of interest to be computed.

We think the decree is utterly wanting in that precision and certainty, so necessary in the final judgments of judicial tribunals, which are to furnish guides and protection to the ministerial officers of the court, who may be charged with their execution, and which ascertain the rights, and fix the liabilities of the respective parties to the proceedings upon which they are rendered.

In the first place, it is with some difficulty that we ascertain who the parties really before the court as defendants are, and upon whom the decree is to operate. The decree itself does not advise us. Again: the register reports a certain sum due to Talman on the first January, 1847, and another sum due to the Ralstons on the 31st December, 1843, with two credits bearing subsequent dates, and that these sums *must draw interest to the time of making his report*, (*10th April*, 1847.) But at what rate are they to draw interest? This remains to be ascertained by proof, as the record furnishes no data for computing the amount. One of the agreements was made in Philadelphia; the other we know not where, but are left to infer, in New York, as the corporation to which made, existed in that State. We cannot judicially know the rate of interest of these States, nor are we aided by the late act of the legislature, to which we are referred, and the table compiled by the Secretary of State, in accordance thereto. The act makes the table of the rate of interest of the several States *prima facie* evidence of the rate to be computed upon contracts, &c.; but this evidence may be controverted, and it may be shown that a rate different from that certified to, obtained at the time the contract was made. The decree leaves the matter in this condition, and orders that "*defendants*" pay the amount so reported, into the hands of the register of the court, by the first day of May then next, or on their failure, the register should "proceed to *sell the property described in the complainants' bill, and mortgages and exhibits*, or so much thereof as shall be necessary to satisfy the complainants' debts, and interest, and costs of suit," &c. The bill, after describing three tracts of real estate as owned by the company at the time of the execution of the equitable mortgage to the complainants, (Ralstons,) avers, that the company was also possessed of large quantities of iron of various descriptions, steam engines, locomotives, cars, and various other chattels, which were pledged by said contract. That Miguel D. Eslava had converted the said chattels, or a large portion of them, to his own use, by selling the same and receiving the proceeds thereof." How many of the steam engines, of the locomotives and cars—what portion of the iron, &c. is the register ordered by the decree to

sell? The decree says all the property described by the bill. But a large portion of the personal property has been sold, and the proceeds received, and the property in the hands, perhaps, of *bona fide* innocent purchasers. Shall the register take the property out of their possession, when they have had no opportunity of being heard in defence of their rights? This he must do, if he would comply with the decree. We need not, however, extend these remarks. It is most manifest, the decree cannot be sustained.

In Gayle v. Singleton, 1 Stew. Rep. 566, it is said, a decree ordering the sale of property in the hands of heirs, must specify and identify it. In that case, the decree was to be levied of the personal estate of M. G., deceased, in the hands of his administrators and heirs: held insufficient. So also, a final decree for money must specify the sum, and not leave it to be ascertained by a commissioner. Clark v. Ball, 4 Dana, 16. In McCartney et al. v. Calhoun et al. 11 Ala. Rep. 120, this court reversed the decree of the chancellor, which referred it to the master to ascertain what sum each defendant should pay, and after their non-payment of the sums demanded, to issue execution. The reason assigned is, the defendants would have no opportunity of excepting to his report; so in this case, the master must find the rate of interest, and if he err, the parties could have no opportunity of excepting.

7. As this case will have to be sent back, an opinion upon the other points raised in the argument, which we have not already decided, may be unimportant, inasmuch as the case may assume a different aspect, when the respective claims of the parties are fully presented. We would, however, observe, that we cannot well conceive how the defendants below can be injured by the preference conceded by the Ralston's to Talman's mortgage. If both mortgages take precedence of theirs, it is a matter of perfect indifference to them, which is first satisfied.

Perhaps it would be premature to express a definite opinion as to the character of the mortgage made to the plaintiffs in error. It is however younger than either of the others, and must be postponed to them, unless there be equitable grounds for referring it back to the time the stockholders

loaned their names to raise funds for the company, and thus to overreach the liens of the defendants in error. From the facts contained in the record before us, we feel perfectly satisfied, that such preference cannot be given to it in the present aspect of the case, and it may well be questioned whether, under any state of facts, this effect can be given to it. And whether the stockholders are not estopped by the acts of their agents, from setting up their mortgage to defeat or override the lien which the company created for the benefit of the complainants below.

Our conclusion is, that the decree of the chancellor in the particulars mentioned above, is erroneous. It is therefore reversed, and the cause must be remanded, for further proceedings.

LEES v. BROWNINGS.

1. A will ordered to probate, without citation to the next of kin resident within the State, or to their guardians, they being minors, is erroneous.
2. When a will has been ordered to probate, without citation to the next of kin, they may be made parties on petition, and sue out a writ of error.

Error to the Orphans' Court of Marengo. Before Hon. J. A. Young, Judge.

On the 23d day of October, 1845, Susan Browning, and William G. Browning, propounded to the orphans' court of Marengo, a paper for probate, purporting to be the last will and testament of Nelson Browning, deceased. Citation was ordered to issue to Joseph L. Browning, and to Wayne E. Lee, guardian of Deartha Lee, Verilta Lee, and Greene W. Lee, who were the next of kin, to show cause why said will should not be admitted to probate. The record shows, that citation was issued to Joseph L. Browning, which was served on him, but it does not appear that any notice ever is-

sued to Wayne Lee, the guardian of Deartha, Verilta, and Greene W. Lee, nor to the minors themselves. The will was probated on the 3d of November, 1845, no one appearing to object to the probate.

In September, 1848, the Lees, who were minors, by their next friend, filed a petition to the orphans' court, showing that they were the children of Mary Lee, who was the sister of the testator, but who had died before the death of the testator, and prayed to be admitted as parties to the judgment probating said will. Notice of this petition being served on the executors, and Joseph L. Browning, and no objection being made, the prayer of the petition, was granted, and they were made parties to the record. They now sue out this writ of error, and here assign as error, that they as the next of kin, had no notice of the probate of said will.

Brooks & Byrd, for plaintiffs in error.

1. The statute is explicit in requiring the next of kin to be informed of the application for the probate of the will of a deceased relative. Clay's Dig. 303, § 34; Shields et al. v. Alston, 4 Ala. Rep. 249.

2. And even the recital in the record, that "due and proper notice was given to the next of kin of the testator," will not authorize the conclusion, that a minor one of the next of kin had been legally notified, or waived notice —there being no notice in the record. Shields et al. v. Alston, *supra.*

3. Where any one claims the right to examine the correctness of a final decree, the proper practice is, for him to propound his interest to the court in which the decree is rendered, to make himself a party, so as to sue out a writ of error, or appeal. Watson and wife v. May, 8 Ala. Rep. 177.

4. The probate of a will, or the refusal to probate a will, by the orphans' court, is such a final decree as will support a writ of error. Shields et al. v. Alston, *supra.*

No counsel for defendants.

DARGAN, J.—The statute, in express language, requires the next of kin to be informed of an application to probate the

will of a deceased relative, and only allows the application to be heard, and determined without notice, when the next of kin do not reside in the State. Clay's Dig. 303. The record shows, that the minor heirs of Mary Lee, were of the next of kin to the testator, and interested with the other next of kin, in his estate. Yet the will was probated without notice to them, or to their guardian. This is clearly an error, for which the probate of the will must be reversed. 4 Ala. Rep. 242.

The plaintiffs in error, claiming an interest in the estate of the deceased, and a right to examine into the decree probating his will, filed their petition, setting forth their interest; and notice of their petition being given to the executors, and other next of kin, they were admitted as parties to the record. This is the correct practice, and entitles them to sue out a writ of error. Watson and wife v. May, 9 Ala. Rep. 177.

The final decree probating the will, must be reversed, and the cause remanded, for further proceedings.

KEY, Adm'r, v. VAUGHN AND WIFE, et al.

1. When the jurisdiction of the orphans' court is apparent upon the record, all reasonable intendments in favor of the regularity of its decrees will be made; it will therefore be intended, that a guardian of infant distributees resides within this State.
2. A power of attorney, acknowledged before one professing to be a justice of the peace in Arkansas, with a certificate of the clerk of the probate court of the county, as to the official character of the justice of the peace, and of the acknowledgment, and registration of the power of attorney, is not sufficiently authenticated, either at common law, or under the act of Congress.
3. It is not necessary, under the act of March, 1848, securing to married women their separate estates, that a trustee should be appointed for the wife, to receive her distributive share of an estate to which she may be

entitled during coverture. Although she may object to its reception by the husband, and ask the appointment of a trustee, if no such objection is made, the husband may receive the property of the wife as trustee, and be held to account accordingly.

4. A decree in favor of husband and wife, and guardian and ward, jointly, is erroneous, but may be amended in this court, at the costs of the plaintiff in error.

Error to the Orphans' Court of Lawrence. Before the Hon. Wm. M. Galloway, Judge.

This case originated in an application of the plaintiff in error to make final settlement of the estate of Thomas H. Seward, of which he was administrator. The decree recited, that the administrator had theretofore filed his account and vouchers, which had been duly examined, audited and reported by the judge; that forty days' notice had been given by advertisements, posted up at the door of the court house in Moulton, and at three other public places in the county, agreeably to law, and a previous order of said court; and that all contested items had been satisfactorily adjusted by the attorneys of the parties in interest. The decree then adjudges that the account, as audited, reported and adjusted, be allowed, &c., which leaves a balance in the hands of the administrator, of $1,612 62, for distribution, and thereupon it orders and decrees, that the administrator pay over to the distributees of Thomas H. Seward, said balance, as follows: To Elizabeth, late widow of the intestate, who has intermarried with Samuel Vaughn, the sum of $322 52; to William Guthrey, as guardian of Elijah E. Seward, the sum of $258 02, &c. It appears by the record, that on the application of the administrator, the court ordered to be entered on its minutes, a power of attorney from Samuel Vaughn, guardian of the minor heirs of the said intestate, purporting to have been executed in Jackson county, and State of Arkansas, acknowledged before a justice of the peace of said county and State, with a certificate of the clerk of the circuit court, and *ex officio*, clerk of the court of probate of the same county and State, as to the official character, &c. of the said justice of the peace, and of the record of said power of attorney in his office. This power of attorney authorizes one Wilkinson, to

demand and receive from the administrator, the several distributive shares of the estate, to which the said heirs are entitled, and a receipt is indorsed on it by Wilkinson, the attorney, acknowledging the payment to him by the administrator, of $334, in part of the amount due.

Wm. Cooper, for plaintiff in error.
No counsel for defendants.

COLLIER, C. J.—The jurisdiction of the orphans' court is apparent from the record; we are therefore authorized to make all reasonable intendments in favor of the regularity of its decree. Wyman et al. v. Campbell et al. 6 Port. Rep. 219; Duval's heirs v. McLoskey, 1 Ala. Rep. 710; McRea admr. v. Pegues, admr, 4 Ala. Rep. 158; Davis v. Davis et al. 6 Ala. Rep. 870. It is uot necessary that the decree should affirmatively show that the guardian of the distributees of the intestate estate resided in this state; under the influence of the principle stated, it must be presumed that the guardian was so appointed that the orphans' court was authorized to recognize him. If this presumption is untrue in point of fact, the objection to his right to receive the shares of the infant distributees should have been made in the orphans' court, and being originated here, cannot be entertained.

As it respects the receipt found in the record, purporting to have been given by the attorney in fact of the husband of Mrs. Vaughn, indicating the payment of a portion of the several distributive shares, in the absence of auxiliary evidence, it cannot be recognized as proof of what it imports. It does not appear that it was proved or admitted to be genuine, nor is it shown that the court was asked to consider it, and reduce the decree in favor of the wife *pro tanto*. But if the genuineness of the receipt had been shown, the proof of the execution of the power of attorney from which it is attempted to deduce the authority of the supposed agent, is altogether insufficient. The certificates of the justice of the peace and clerk of the acknowledgement and registration of the power, and of the official character of each of these officers, are not sufficient to authenticate the power under the legislation of congress or according to the common law.

The act of March, 1848, "securing to married women their separate estates, and for other purposes," is expressed in terms so exceedingly loose and general, as to devolve upon the court in almost every case arising under it, (until its meaning is settled) the necessity of interpreting the legislative intention by the legal rules of construction; and often under circumstances of great perplexity and doubt. We think however it may be safely assumed, that it does not require that a trustee should be appointed for the wife to receive her distributive share of an estate, to which she may be entitled during coverture. True, she may object to its reception by her husband, and ask that some third person may be appointed a trustee for her. But the objection must come from the wife, or be made in some other legal mode, or the husband may well be treated as the trustee, and the property of the wife be received by him. Where the separate estate of the wife is received by the husband, he is treated as her trustee, and will be held to account accordingly. Clancy on H. & W. 256, *et seq.;* Hoot et al v. Sorrell et al. 11 Ala. Rep. 386.

In the present case, the decree ascertains what is due to the wife and each of the other distributees, and directs the several shares to be paid; the wife's to herself, and the other shares to the guardian of the infant distributees. This perhaps may be unobjectionable, but then the decree adjudges that the husband and wife recover *jointly;* also that each of the infant distributees and his guardian recover. The decree in legal effect gives to the husband and wife a joint execution, and entitles the husband, should the wife die previous to its satisfaction, to an execution in his own name, and the guardian could in like manner control the decree as a survivor in the event of the death of a ward; and this although the guardian had been removed from his trust. In these several particulars the decree is incorrect, but the error is a mere clerical mistake amendable under the act of 1824; and must be here amended at the costs of the plaintiff in error. The clerk of this court will so modify that part of the decree which adjudges the several distributive shares, as to adjudge that the husband and wife recover for the use of the wife, and that the minor children by their guardian recover, setting out sev-

erally the names of all the parties. Parks v. Stonum 8 Ala. Rep. 752.

In the case before us, there was no distinct and substantive order (as in McCleod v. Mason, 5 Port. Rep. 223,) for an execution to issue, consequent upon the rendition of the decree, and an amendment may therefore be here made. In McCleod v. Mason the decree was drawn out in due form and signed by the judge, and afterwards a distinct order was made on motion of the guardian, that execution issue in his name to recover of the former guardian of the infant ward, the sum adjudged by the decree to be due. We thought that what was technically called the *decree* was in itself sufficient, and would have authorised an execution to issue in the name of the ward by her guardian; but the subsequent order controlled it, and improperly made the guardian the primary and sole plaintiff in execution. This order introduced an error which was a judicial act, and consequently not amendable in this court. This view is decisive of all the points made by the plaintiff in error, and the consequence is, that the decree must be here amended in the manner we have indicated, at his costs.

NELSON AND HATCH v. DUNN ET ALS.

1. If a bill is wanting in equity, the chancellor may dissolve the injunction, in vacation, after the coming in of the answer, notwithstanding all its allegations are therein admitted.
2. A cross bill, formal in other respects, but which omits the prayer, that it be allowed as such, and heard with the original bill, is amendable, and, on an application to the chancellor, in vacation, to dissolve the injunction, should be regarded by him, *pro hac vice*, as amended. Such bills are treated with greater indulgence than original bills.
3. A cross bill is a mode of defence, and is dependent on the original bill, forming with it, but one suit, and, although its allegations must relate to the subject matter, it is not restricted to the issues, of the original bill
4. It is not necessary, that a cross bill should alledge any ground of equity

as against the complainant in the original bill, to give the court jurisdiction.

5. If a party having a defence, which is available, either in a court of law, or a court of equity, elects to assert it in the former, and fails, he is concluded thereby from insisting on it, in the latter tribunal, unless he can show some special ground for its interposition, such as, fraud, or accident, unmixed with negligence on his part, by which it was rendered unavailing: but an unsuccessful attempt to assert, in a court of law, a defence purely equitable, is not an estoppel in a court of equity.

6. It is a general rule, that where a court of law has first taken cognizance of a matter, of concurrent jurisdiction, a court of equity cannot interfere: but if the plaintiff at law files his bill, and submits the matter in controversy to a court of chancery, such court, the defendant not objecting, will retain jurisdiction of it, and proceed to do full justice between the parties.

7. If a complainant in a bill admits an indebtedness by him to the defendant, a court of equity will not become active in his behalf, unless he pays, or offers to pay it, as the court may direct; but in a bill for an account, it is not necessary, that the complainant should offer to pay whatever balance may be found against him.

8. Where N. and H. purchased from A. H. a plantation and slaves, and executed to him their notes, and a deed of trust, on the property, to secure their payment, and A. H. assigns a part of said notes to D., in trust, to secure certain debts, due by A. H. to sundry creditors, and N. becomes the *bona fide* holder of a portion of the debts, to secure which said notes of N. & H. were assigned by A. H. to D., and D. sues N. & H. on said notes, a court of chancery, on a bill, filed by N. & H. against D., will restrain him from collecting out of them, such portion of said notes, as when collected, D. would have to pay over to N.

9. Where several notes, secured by deed of trust, are assigned by the payee, to different persons, at different times, the assignment of each note is, *pro tanto*, an assignment of the security; and the liens of the several assignees are to be preferred, according to the priority of the assignments, without reference to the maturity of the notes.

10. If N. & H. have *two* funds, as security for their debt, D. having an interest in *one only*, can compel N. & H. in equity, to resort to the *other* fund *first*, if it be necessary to do so, for the satisfaction of the debts of *both*.

11. If N. & H. sell property, which is subject to two incumbrances, *to C.*, the *junior* incumbrancer, in extinguishment of C's lien, this will not defeat the right of the *senior* incumbrancer, to have satisfaction of the property, more especially, if C. purchase, with actual notice of the prior equity.

12. A voluntary assignment, by a debtor, to a trustee, for the security of debts, is invalid to pass the title of the property to the trustee, until it is assented to, either *expressly or impliedly*, by the creditors, whose debts it is intended to secure.

13. If a creditor, for whose benefit, an assignment is made, dissents from it

and subsequently, by a new and distinct arrangement with the assignor, acquires the right to dispose of the subject of the trust, his title will vest from the date of such arrangement, and cannot be extended back to the date of the assignment, so as to overreach an intermediate equity.

Appeal from the decree of the Hon. J. W. Lessesne, in vacation, sitting for the Third District, Southern Chancery Division, dissolving an injunction.

Dunn, filed a bill in the chancery court of Sumter, against the appellants, and McCain and Kendricks, in which he states, that about the 15th of June, 1840, Alexander Henderson, sold to Nelson and Hatch, a plantation and negroes, for upwards of $81,000; for the payment of which, they executed eleven promissory notes: the first, payable on the 1st of May, 1841, and the rest falling due annually, from that time to the 1st of May, 1851, and to secure the payment of these notes, executed a deed of trust upon the property, to Kendricks, as trustee. That Henderson, shortly afterwards, assigned to Dunn the fourth, fifth, sixth, and seventh notes, in the order of maturity mentioned. That Nelson and Hatch, had paid one or more of the other notes, and prays discovery. That after the assignment of the four notes to Dunn, Henderson became greatly embarrassed, and to place the other notes, not assigned or paid, in a condition for his own benefit, or that of his friends and relatives, and amongst the rest, for the benefit of Joseph W. Chalmers, or his wife, who was a daughter of Henderson, assigned, or professed to assign, the other notes. That some of these notes were assigned to Chalmers, and one of them to McCain; but charges that these assignments are invalid, and of no avail against Dunn, or the claims he holds. That Henderson died intestate, and there is no administrator upon his estate. That the trust fund is insufficient to pay all the notes remaining unpaid, and that Dunn is entitled to be preferred, in the application of the trust fund. That Dunn had instituted suits on two of the notes assigned to him, and the other was not due. That these suits were pending, and Nelson and Hatch were defending them, and setting up, by way of offset or defence, counter claims against Henderson, for failure of title in some of the lands sold by him; for defects in some of the negroes, and for money paid for Hender-

son. That if these defences existed, they had been allowed when the two notes which had been paid, were taken up. That if Nelson and Hatch were entitled to any deduction, it should be restricted to the notes they had taken up, or to the notes in the hands of Chalmers and McCain, or charged upon the whole number of notes given on the purchase, or else upon those remaining unpaid; whereas Nelson and Hatch, were endeavoring to set up the whole against Dunn: and, that Kendricks, the trustee, refused to execute the trust, and had relinquished it. Nelson, Hatch, Chalmers, McCain and Kendricks, are then specially interrogated, amongst other things, how, when, for what consideration, and under what circumstances, Chalmers, and McCain, came into possession of the notes they held; and the bill concludes with a prayer for the appointment of a trustee, to execute the trust: that the trust should be executed, and the trust fund marshalled, and for full discovery, and general relief.

Nelson and Hatch answered the bill, admitting the purchase of the property, the execution of the notes and deed of trust, and the assignment of the four notes to Dunn; but insisting that the assignmeut was merely collateral, and to secure tde payment of certain debts of Henderson. They also admit they have paid the first two notes that fell due, but paid them in cash, to *bona fide* holders, by transfer from Henderson before Dunn's assignment; and they deny that they had paid them to Henderson, or that any abatement or offset, which they had, was deducted: but insist on the contrary, that before they knew of their defences, and before they had notice of Dunn's assignment, they had promised to pay these notes to holders of them by transfer from Henderson, though they paid them in pursuance of that promise, after notice of the assignment to Dunn.

They further answer, that they know nothing, of their own knowledge, of the assignments of the other notes, but were informed by Chalmers and McCain, in the latter part of the year 1840, that they were the holders of the other notes, and looked to them for payment. They also admitted, that three of the notes assigned to Dunn, were due and sued on, and that the other was running to maturity, but deny that Dunn was entitled to be preferred in the application of the

trust fund. They also admit, that they were defending the suits, and had valid defences: which defences they state to consist in the payment of a large amount to relieve incumbrances on the land, of which they knew nothing when they purchased it: in the loss of a valuable portion of the land purchased, by eviction under a paramount title: in the unsoundness of some of the slaves: in the payment of a large sum for Henderson on a debt for which Nelson was liable as Henderson's surety before the purchase, and in other offsets, amounting in the whole to a very large sum: (the amount of each item being particularly stated in the answer.)

They further answer, that in May, 1844, they sold their interest in the trust property to Chalmers, and took up the last four notes that were running to maturity: but respondent Nelson, was to keep possession of the property, until, from the proceeds of the farm, he could pay the notes held by Dunn and McCain, or such part of them as might be due after deducting the offsets and deductions held against them, and all other liabilities which Nelson and Hatch were under, on account of the purchase.

Chalmers also answered, to the same effect as the answer of Nelson and Hatch, as far as it goes; and in addition insists, that Dunn received the notes he held, from Henderson, on the 1st of October, 1840, to collect, and when collected, he was to apply the proceeds to the payment *pari passu* of certain debts of Henderson, several of which Nelson himself had taken up. That on the 9th of November, 1839, Henderson purchased slaves of him to the amount of $10,800, and gave his notes for them, payable in three equal annual instalments: he was also indebted to him for the hire of negroes, &c. to the amount of $2,500. That in the month of June, 1840, Henderson informed him of the sale he had made to Nelson and Hatch: that he feared he was rendered insolvent, by the failure of a firm, of which he was a member, and that he had assigned to R. W. Thomas, the last four of Nelson and Hatch's notes that were to be paid, to pay the debt due by him to Chalmers, and other creditors. That in October of the same year, he being dissatisfied with Henderson's arrangement, and alarmed for the safety of his debt, and Tho-

mas declining to act as trustee, it was agreed that Chalmers should receive the notes which Thomas held, to pay his debt, and the other debts secured in the assignment to Thomas; and that in pursuance of this arrangement, Thomas, in the presence of Henderson, delivered the notes to him (Chalmers) as his own property, subject to the said agreement. He denies, that Henderson, or any of his friends or relatives, have any interest in these notes, and insists that, on the contrary, he has had the entire control of them, until they were surrendered to Nelson, when he purchased the interest of Nelson and Hatch, in the trust property.

The answer of Kendricks, the trustee, which was also filed, is not material.

McCain also answered the bill, admitting the purchase by Nelson and Hatch, the execution of the notes, deed of trust, &c.: and denying any knowledge of any transfer or assignment of any of the notes, except the one he holds; which he says he holds as agent of Nicholas L. Williams, to whom it was transferred and conveyed by Henderson, by a deed of trust executed on the 1st of September, 1840, to secure a number of *bona fide* creditors therein mentioned.

On the 15th of June, 1847, the chancellor decreed, that a trustee be appointed to execute the trust: that it be referred to the master, to inquire and report a proper person for this purpose: that as soon as the cause should be at issue, the master should inquire and report of all the matters involved and in issue in the case, and take and report an account.

Notwithstanding these proceedings in the chancery court, Dunn continued his proceedings at law, on the three notes in suit when the bill was filed; had sued on the other note which matured afterwards, and at the November term, 1847, of the circuit court of Sumter, had obtained judgments on the three notes first sued on, for $22,129 50, on which executions had been issued, and the money about to be collected out of Nelson and Hatch.

Thereupon, Nelson and Hatch, and Chalmers, filed a cross bill against Dunn and McCain, setting forth the foregoing proceedings, and in addition thereto, stating, that at the time Nelson and Hatch purchased the plantation and slaves of Henderson, and as a part consideration of the notes given,

Henderson sold them an eighty acre tract of land, which was intended to be inserted in his deed to them for the property purchased, and intended to be conveyed thereby; but which, by mistake, was omitted from the deed. That this land was recovered of them in the same action in which a recovery was had, as stated in the answer of Nelson and Hatch to Dunn's bill, as to both of which parcels of land, Nelson and Hatch were evicted by a title paramount to that of Henderson. That this land, which by mistake was not conveyed in Henderson's deed to Nelson and Hatch, and the other which was, and which was also recovered, formed a valuaple portion of the plantation purchased of Henderson, and by reason of its being heavily timbered, (while the rest of the plantation had little or no timber upon it,) the value of the whole plantation was lessened, at least to the amount of $4,000. That when Nelson and Hatch filed their answer to Dunn's bill, they knew this land was omitted from Henderson's deed by mistake, but did not insist on it as a defence, because they were under the impression that the facts were not susceptible of proof, and for that reason, they were advised by their counsel, who drew their answer, that it would be useless to insist on it as a defence: but since that time, they have ascertained that the facts are susceptible of proof. That Dunn is not the holder of the notes assigned to him, by Henderson, for a valuable consideration: but took them to collect, and apply the money when collected, to the payment of certain debts of Henderson, a large amount of which Nelson himself had taken up since the assignment to Dunn: and that Dunn did not give any new consideration for the transfer of said notes, nor take them in satisfaction of any debt, nor release any right, as a consideration of the transfer. That the debts secured in the assignment to Dunn, which have been paid or acquired by Nelson, are expressly provided to be paid from the fund assigned to Dunn, and it would be unjust and oppressive, to compel payment of so much of that fund, as Nelson would be entitled to from it. That on one of the debts secured in the assignment to Dunn for $5,000, there is really only about $1,000 due. That the losses by reason of the failure of title to the land, amount to $6,589: the liens on the other land, removed by Nelson and Hatch, to $2,172:

and the amount coming to Nelson out of the fund assigned to Dunn, to $10,667 38: and that the complainants are unable to ascertain whether Nelson will be entitled to the whole amount of the claims embraced in the assignment to Dunn, which he has taken up, or acquired, or only to a *pro rata.*

The cross bill prays a discovery of the equities of the parties, of the amount really due on the $5,000 debt in the assignment to Dunn, and to be paid out of the fund to be collected of Nelson and Hatch: for an injunction restraining Dunn, from proceeding in his action at law on the note in judgment, and from collecting the sum of $12,935, on the judgments which he has already recovered, until the account prayed for by his bill, and decreed thereon, is taken, and that an abatement from the amount claimed by Dunn, or Dunn and McCain, to the extent of the rights of Nelson and Hatch, and Nelson alone, may be allowed.

The answer of Dunn admits all the allegations of the cross bill, except that of the omission of the land from Henderson's deed, and as to that, he says he knows nothing. But he insists, that all the offsets and abatements, claimed by Nelson and Hatch, except that, were litigated, and determined against them in the suits at law, and refers to a copy of the record attached to his answer, to show that fact: (upon reference to that record, however, no such fact appears, as far as the land losses are concerned.) And he insists also, that the transfer of the notes to him was prior to the transfer to Chalmers.

Upon this state of the case, Dunn, made a motion in vacation to dissolve the injunction, and the chancellor granted the motion.

From the order of the chancellor dissolving the injunction, Nelson, and the other complainants in the cross bill, prayed, and now prosecute an appeal to this court.

R. H. Smith, and Reavis, for the appellants.

First. After the decree in favor of Dunn, the defendants had an interest in it, and Dunn could not dismiss the bill: neither had he any right to proceed at law for the same matter: if he does so, the chancery court will restrain him by injunction. Mocher v. Reid, 1 Ball & Beat. 145, top page;

The Matter of Hemiup, 2 Paige, 316; 1 Vesey & Beames, 313; 8 Vesey, 520; 4 Bro. Ch. Rep. 162; Lashly v. Hogg, 11 Vesey, 602; Turnipseed v. Crook, 8 Ala. R. 897; 4 John. Ch. Rep. 636.

Second. An injunction cannot be dissolved on motion, upon matters not responsive to the bill. McNamara v. Irwin, 2 Dev. & Bat. 19; Minturn v. Seymour, 4 Johns. Ch. Rep. 497; 1 Dev. & Bat. Eq. Rep. 38; Lindsay v. Etheridge, 1 Dev. & Bat. 38; McClure v. Colclough, 6 Ala. R. 492.

Third. The denial of the facts stated in the bill, to authorize the dissolution of an injunction, must be positive. Calhoun v. Cozens, 3 Ala. R. 498; 3 Dan. Ch. Prac. 1831, and cases in note 1.

Fourth. On a motion to dissolve an injunction, the *facts* set forth in the answer are alone to be regarded, not the *opinions* of the defendant. 1 Bland. 335.

Fifth. An injunction cannot be dissolved in vacation for want of equity, but upon the denials of the answer alone. Clay's Dig. 358, § 82.

Sixth. If the irresponsive allegations may be considered, the record of the trial of the suit at law, referred to in Dunn's answer, does not show, as he avers, that the losses by reason of the failure of title to part of the land, and the removal of incumbrances from it, were involved or passed upon, in the litigation at law; this averment, therefore, can have no influence. McClure v. Colclough, 6 Ala. R. 492.

Seventh. It is not necessary that the cross bill should contain equity. 3 Dan. Ch. Prac. 1746, and cases referred to in note 1, on p. 1747; 6 Monroe, 119; 3 Dan. Ch. Pr. 1744.

Eighth. The cross bill has abundant equity, as the following propositions will demonstrate:

1. As Dunn admits, in his answer, that he holds the notes assigned to him as collateral security for debts of Henderson, he holds them subject to the same defences arising out of the *consideration* of the notes, as if they were still in the hands of Henderson himself. Cullum v. Br. Bank, 4 Ala. R. 22; 6 ib. 643; 8 ib. 920; 1 S. & P. 107; 5 Mason, 214.

2. The loss of the land conveyed by Henderson, and the discharge of incumbrances upon it, can only be compensated

in equity. Cullum v. Br. Bank, 4 Ala. Rep. 22; Andrews & Bro. v. McCoy, 8 Ala. Rep. 930.

3. Such is the case also, in regard to the land omitted from Henderson's deed by mistake, and this, though Henderson is insolvent, or not. 1 Dev. Eq. Rep. 379; 3 Johns. R. 506.

4. Henderson was insolvent when the notes were assigned to Dunn, as is shown by Dunn's answer: as far, then, as the debt is concerned for which Nelson was liable as Henderson's surety, before the assignment to Dunn, is concerned, an equity attached before the assignment, which became perfect as against Dunn, by the subsequent payment. Tuscumbia R. R. Co. v. Rhodes, 8 Ala. R. 206.

5. As this defence can only be made in equity, (8 Ala. R. 929,) Nelson's right is not affected by the unsuccessful attempt to make it available as a set-off at law. Calloway v. McElroy & Hannagan, 3 Ala. R. 406. And this rule applies also to the land losses, even if any effort had been made to use them as a defence at law.

6. Nor does it make any difference, that the judgments at law have been affirmed by the supreme court. McClure v. Colclough, 5 Ala. R. 65.

7. The assignment to Thomas for the benefit of Chalmers, having been made in June, 1840, of the note McCain holds in September, 1840, and of the notes to Dunn in October, 1840, the land losses and the Physioc debt, must fall upon Dunn, he being the last assignee. Cullum v. Erwin, 4 Ala. R. 452; Andrews & Bro. McCoy, 8 Ala. R. 930; Nelson et al. v. Dunn, at the last term.

8. If this position is not true, the priority of assignment only controls the rights of the parties in marshalling the trust fund: and if they all, in other respects, stand in *equali jure*, the loss by reason of the failure of consideration, should be borne equally by all the assignees. Andrews & Bro. v. McCoy, 8 Ala. R. 930.

9. Nelson is entitled to a large amount of the debt which Dunn is seeking to collect from him: Dunn admits this in his answer: now it is evident, that it would be grossly unjust, and ridiculous, to permit Dunn to collect money out of Nelson, which he would be liable immediately, to refund to him. To prevent such injustice and injury, a court of chan-

cery will interpose by injunction. Poor v. Carleton, 3 Sum. 75, 76; note 1 to 3 Dan. Ch. Prac. p. 1831.

10. The trust property is not liable to be sold under the executions, without the consent of the beneficiaries, but the property of Nelson and Hatch is: they have an interest, therefore, in reducing the debt as much as possible: besides, Nelson is bound by his contract with Chalmers, to avail himself of his defences against the outstanding notes.

11. Chalmers is interested also in charging the offsets and failure of consideration upon Dunn: and either upon this ground, or because he is the first assignee, and has a priority over Dunn in marshalling the trust fund, might maintain the injunction against Dunn, alone, until their respective rights are settled in the chancery suit begun by Dunn.

12. To dissolve this injunction, would in effect, be to pass a decree upon the merits of the original cause, before any proofs have been taken in it, and before the master has made a report in pursuance of the decree.

Hopkins, contra.

The right of Dunn to maintain the suits at law is a legal question. The cross bill being for relief, as well as for recovery to the extent of the relief sought, it is an original bill, and no relief can be granted which is not equitable. Story's Eq. Pl. 317, § 398.

The cross bill is for relief upon matter which might have been determined in the suits at law, and against judgments at law. 5 Porter, 547; 2 Ala. Rep. 21; 7 Porter, 553; 8 ib. 432; 6 ib. 27; 3 ib. 436; 7 ib. 86; 1 Ala. Rep. 351.

A cross bill is a defence merely to the original bill, and must be confined to the matter in issue in the original bill. Hop. C. R. 58. The value of the land, therefore, which by mistake was not conveyed to Nelson and Hatch, cannot be noticed by the court, because not set up as a defence in the answer to the original bill. 8 Porter, 432; 7 id. 86; 7 Ala. 233.

A bill cannot be treated as a cross bill, unless the complainants pray that it may be heard at the same time as the original bill. 7 Ala. 233; 1 Edwards, 226.

The contract entered into by Chalmers with Henderson,

after the deed executed by Henderson to Thomas, for the benefit of Chalmers, was an abandonment of the prior contract entered into with Thomas. 2 Call's Rep. 103; 150. The equity of Dunn being therefore prior to that of Chalmers, will be preferred. 4 Ala. R. 452; Hop. Ch. Rep. 569; 10 Peters, 177.

CHILTON, J.—Before proceeding to notice the main points so elaborately discussed at the bar, we will briefly dispose of some objections made to the frame of the cross bill, and questions of practice, as to the dissolution of injunctions by the chancellor in vacation.

1. We need not examine the question, whether the defendants to the original bill acquired such an interest in the decree appointing a trustee, and ordering a reference to the matters of account to the register, as would prevent the complainant in that bill from dismissing it. The record shows, that although Dunn has instructed his counsel to dismiss it, the bill was pending when the motion was made to dissolve the injunction in this case, and we will so regard it, for the purposes of this trial.

2. We do not agree with the counsel for the plaintiffs in error, that the chancellor in vacation has no power to dissolve an injunction, except upon the denials of the defendants' answer.

The statute (Digest, 358, § 82,) requires that the answer must be filed, before the chancellor in vacation can dissolve, but after it is filed, the chancellor should look to the whole case made by the pleadings, and if the bill contain no equity, dissolve the injunction, although the answer admits its allegations.

3. The defendants' counsel insists that the injunction was properly dissolved, as the paper purporting to be a cross bill, contains no prayer that it be allowed as such, and heard with the original bill.

The authorities on which he relies, (7 Ala. 233, and 1 Paige, 226,) show, that the court may refuse to treat the pleading as a cross bill, in the absence of such prayer. But this is an objection to mere matter of form, which is clearly amendable, and which the chancellor should not regard,

upon an application to dissolve the injunction in vacation. The frame of the bill gives indubitable proof of its character, and as the chancellor *in vacation* had no power to allow the amendment, he should have considered it as amended. It would seem, that cross bills are treated with greater indulgence than original bills. In Severn v. Fletcher, 5 Sim. 457, an amendment was allowed, changing the character of a cross bill for discovery only, to one for relief.

4. The counsel for the appellees further insist, that there is no equity in the cross bill, so as to authorize an injunction, or to afford ground for relief. That the defences set up are of a legal character, and are concluded by the judgments at law: or if not of that character, they are wanting in equity —hence, for this reason, the injunction was properly dissolved.

A cross bill is a mode of defence, to which a defendant resorts when he seeks some discovery, or asks relief touching the subject matter of the original bill. It is treated as an auxiliary suit, forming, with the original bill, but one cause or suit. 7 Johns. Ch. Rep. 252; Story's Eq. Pl. § 399; Dan. Ch. 1742. It is true, the allegations of the cross bill must relate to the subject matter in controversy in the original bill; but the rule does not, as is supposed by the counsel, restrict its office so as to confine it to the issues in the original cause.

Thus, a cross bill has been allowed to answer the purpose of a plea *puis darrein continuance* at the common law. Mitford's Eq. Pl. 82; Story's Eq. Pl. § 393; Dan. Ch. Pr. 1743.

So also, for obtaining an equitable set-off, (4 Met. Rep. 104;) and to rescind a contract, where the original bill sought to enforce a lien for the purchase money. Wickliffe v. Clay, 1 Dana, 589. Or to establish and confirm a conveyance, where the original bill sought to set it aside. 11 Wheat. Rep. 446; Dan. Ch. Prac. 1744.

These authorities may suffice to show, that Nelson and Hatch may well set up the defences they attempt to make, so far as the frame of the bill is concerned. That some of their counter claims, or deductions, are cognizable at law,

can make no difference. They are connected with the matter of the original bill. Hume v. Long, 6 Monr. Rep. 119; Clay v. Wickliffe, 1 Dana's Rep. 589.

The complainant in the cross bill, as against the complainant in the original bill, is not bound to show any ground of equity to support the jurisdiction of the court. 4 Met. Rep. 104; Dan. Ch. Prac. 1747; Story's Eq. Pl. § 399.

5. As to the conclusive character of the judgment at law, against Nelson and Hatch, the general rule undoubtedly is, that if a party has a right either to defend at law, or proceed in a court of equity, and he elects to make his defence in the law court and fails, he is concluded by the judgment of that court, unless he can show that he is entitled to overhaul the judgment in equity upon some special ground, such as fraud or accident, unmixed with his negligence, by which a valid defence was rendered unavailing. Our own reports abound with authorities upon this point. This rule deprives Nelson and Hatch of the benefit of all such legal defences as they set up upon the trial at law upon their notes. We need not designate particularly the items of their defence which come within the influence of the rule, as the view we take of the case upon another point renders it unnecessary. It is however, proper here to remark, that the loss they sustain by reason of the failure of title to a portion of the land, which they state at the sum of $6,589 08, and the liens which they were compelled to discharge, and for which payments they have a right to resort to the covenants in Henderson's deed, say $2,172 33, as also the amount due Nelson out of the notes assigned to Dunn, stated at $10,667 38, are all equitable defences, and could not have been allowed at law. Dunn v. White et al. 1 Ala. Rep. 645; 8 ib. 793. So that an insufficient effort to plead them at law, cannot debar the defendants of relief in chancery.

6. It may be conceded, as a general rule, that where two courts have concurrent jurisdiction over the same thing, the one which is first possessed of the cause, has a right to proceed with it, and cannot be prohibited or restrained by any other. 9 Wheat. Rep. 532; 5 Hump. Rep. 50; Pr. in Ch. 547. But the defendants in error can derive no aid from this principle, inasmuch as the original bill proposes to adjust the

whole merits of the controversy between the parties. The parties interested are brought before the court by Dunn's bill, and he proposes to adjust the deductions which Nelson and Hatch are setting up against him at law, and to apportion the same among the several holders of the notes assigned by Henderson, as the court may decide their equities may require.

The defendants submit to the jurisdiction which has thus attached to the subject matter, and averring their readiness and willingness to pay what may be found due to Dunn, after allowing them the abatements claimed, file their cross bill to obtain such allowance. Having obtained jurisdiction upon the application of Dunn, the court of chancery will proceed to do full justice between the parties, and restrain either of them from taking an inequitable advantage in the law court. Certainly Dunn cannot object that the defendants have no business in the chancery court, when they were brought there upon his bill, to which theirs is but a mode of defence.

7. The counsel for Dunn further contends, that the complainants in the cross bill should not be allowed to stop the proceedings at law as to any portion of the claims there sued for, because they do not offer to pay the sum which is confessedly due to Dunn.

The rule certainly is, that he who seeks the aid of a court of equity, must himself do what is equitable, and if he admits an amount due to the defendant, the court of chancery will not become active in his behalf, until he pays, or offers to pay, as the court may direct, the sum thus admitted to be due.

It seems, however, that in a bill for an account, it is not necessary for the plaintiff to offer to pay whatever balance may be found against him. 1 Smith's Ch. Pr. 8; Dan. Ch. Pr. 442; Colombian Government v. Rothschild, 1 Sim. 94, 105. But if such averment were necessary in the cross bill, which seeks an account of the sums to which the plaintiffs are entitled as abatements upon the notes held by Dunn, we think the allegation, that they are ready and willing to pay whatever sum may be due, after allowing them the abatements to which they may be entitled, is a substantial com-

pliance with the rule, inasmuch as it requires the action of the court to determine what sum is due.

8. Having settled the preliminary questions, we now come to the main matter in controversy, which involves the priority of the liens created by the several assignments of the notes by Henderson, and whether Nelson and Hatch should be allowed to abate the notes in Dunn's hands, or be turned round to the other notes subsequently assigned, to seek their indemnity.

Before proceeding, however, to inquire as to the respective equities of the parties with respect to the deductions claimed by Nelson and Hatch as connected with, or growing out of the original transaction between them and Hendorson, we should observe, that as to the claims secured by the assignment of the four notes to Dunn, and which were purchased in by Nelson, amounting, with interest, as averred in the cross bill, to $10,667 38, we think Nelson and Hatch have the clear right, under the present state of the pleadings, to have the collection of that sum enjoined. Dunn admits that Nelson has bought up the claims, but says he will not be entitled to the full amount of said claims, but only to a *pro rata* distribution. That the four notes assigned to him when collected, after the expenses incurred are deducted, will not be sufficient to pay all the debts they were intended to secure. The answer of Dunn does not say what the expenses are, or how much the notes will fall short of paying the several demands secured, nor what the amount of Nelson's *pro rata* share will be. He however avers, "that this *pro rata* he has no wish or desire to collect from said Nelson and Hatch." Now, as Dunn could have made this matter plain—as he is presumed to know the amounts of the expenses which are to be deducted from the proceeds of the four notes, and has failed to furnish any data upon which the court could act understandingly, we feel bound, so far as the injunction is concerned, to assume the amount stated in the cross bill, as the amount to which Nelson is entitled, and as to this sum, the chancellor should have continued the injunction. There is certainly no equity in allowing Dunn to collect funds which, when collected, the court the next moment would order to be refunded, more especially, as Dunn

protests that he has neither *wish nor desire to collect the same.*

9. What are the equities of the parties with respect to the defences of Nelson and Hatch, growing out of the original transaction, or consisting of sets-off and demands against Henderson, acquired by them since the negotiation for the property, and before notice of the assignment of their notes?

It has been decided by this court, that the assignment of the notes is *pro tanto* an assignment of the deed of trust designed for its security, and that the assignees are entitled to priority of payment out of the trust fund, in the order in which the assignments were made, and not according to the time of the maturity of the notes. Cullum et al. v. Erwin, adm'r, 4 Ala. Rep. 452; see also Hop. Ch. Rep. 569, 575; 2 Story's Eq. Jurisp. § 1233, p. 600, n. 1, 3d ed.

10. It is furthermore, a well established rule in equity, that if a party has two funds, a person having an interest in one of them only, has a right in equity to compel the former to resort to the other, if it is necessary for the satisfaction of both. Per Ld. Eldon, 8 Ves. jr. 388; 9 ib. 211; 15 ib. 399. The same rule seems to obtain, at least to a qualified extent, at law. See Nelson and Hatch v. Dunn, 13 Ala. Rep. 259; 12 Wend. Rep. 355; 6 Dana's Rep. 223; 2 Grattan, 44.

11. From the two foregoing propositions, it results, that if the lien, which the transfer of the four notes to Dunn created upon the trust effects, is prior to that created by the assignment of the four notes to Chalmers, and the notes held by Chalmers are sufficient to cover the demands asserted as abatements by the cross bill, (and the bill shows that they are ample,) then Nelson and Hatch should be turned round to the notes in Chalmers's hands for their indemnity. For if they are permitted to extinguish the demands in the hands of Chalmers, with a knowledge of the prior lien of Dunn, reserving their deductions and abatements as defences against Dunn's claim, they will by their election have destroyed the equitable relation of the holders of these notes, and have effectually defeated the prior lien, while the *puisne* incumbrancer has obtained full satisfaction. Such doctrine does not accord with the principles of equity.

12. If Dunn has the prior lien upon the trust effects for

the amount of the demands assigned by Henderson to him, it is clear that the sale of the trust property, by the makers of the trust deed, (Nelson and Hatch,) in extinguishment of junior liens, cannot defeat his right to satisfaction, especially when the sale was made with a full knowledge of his equity. The trust is still subsisting, and the property still bound. The rule is, that the vendee of the mortgagor must either pay the debt, or surrender the property charged with the lien, to be sold for its satisfaction. Champion v. Brown, 6 Johns. Ch. Rep. 398.

13. It then becomes important to ascertain, which has the prior lien, Dunn or Chalmers; for upon this question depends, as we have attempted to show, the right of Nelson and Hatch to sustain their defences as discounts or sets-off, or equitable abatements upon the notes held by Dunn. There are nine notes outstanding, or were, before the negotiation between Chalmers, and Nelson and Hatch: one of these was assigned by Henderson to McCain, on the 1st September, 1840; four to Dunn, on the 1st of October, 1840; and the remaining four to Chalmers, on the —— day of October, *after* the assignment of the notes to Dunn.

It is, however, insisted, that the transfer to Chalmers has relation back, and should date from a previous transfer of the same notes made in June, 1840, by Henderson, to one R. W. Thomas, to secure the debt due from him to Chalmers, with other demands. However this may be in fact, we cannot come to this conclusion from the record before us, to which our inquiry must be confined. The cross bill, in setting out the answer of Chalmers to the original bill, gives the following account of the transaction: "That Henderson came to his (Chalmers's) house in June, 1840, and informed respondent that, by reason of the failure of the firm of Henderson, Garrett & Co., (of which he was a member,) he feared that he was rendered insolvent. That he had sold his property to Nelson and Hatch, and had assigned to Richard W. Thomas, of Mississippi, since deceased, notes Nos. 8, 9, 10, 11, in the bill mentioned, to pay respondent the debt due him and other creditors. *That this respondent was dissatisfied with said arrangement*, and said Thomas subsequently declined acting. That Henderson then went to North Caro-

lina, and on his return in *October*, said he had assigned note No. 3 to one N. L. Williams, and notes Nos. 4, 5, 6 and 7, to said Dunn, to collect, and pay certain creditors. That on receiving said information, he (Chalmers) became alarmed for his debt, and said Thomas declining to act as trustee, he insisted upon, aud it was finally agreed that respondent should receive the notes Nos. 8, 9, 10 and 11, to pay his debts, and other debts secured in the assignment to Thomas." And after stating that Henderson had placed collaterals in the hands of one Martin, to be applied to the same demands to be paid by him, the answer states, "that in consideration of said debts due respondent, the said Thomas delivered to him the said notes, in the presence of Henderson, on the day and year aforesaid. That he received said notes *absolutely as his own*, subject to the agreement aforesaid, *free from the control of Henderson, and all other persons.*" He then goes on to state the cancellation of said four notes, by an arrangement between him and Nelson and Hatch, in the purchase from the latter of the whole of the trust property.

Was the assignment by Henderson to Thomas valid; and if so, what is the effect of the subsequent agreement between the parties? We regret that we are not more fully advised, as to the character of the assignment to Thomas. It is said, it was made to pay Chalmers, and other creditors. Now, whether the *other creditors* provided for, assented to this provision for their security, or whether the deed was such as to require their assent to render it valid, we are not informed. Certain it is, that Chalmers, upon being informed of the arrangement between Henderson and Thomas, was dissatisfied.

It is too well settled by this court, to be now the subject of controversy, that a voluntary conveyance to a trustee, by a debtor, for the security of debts, is invalid to pass the title to the trustee, until it is assented to, either expressly or impliedly, by the creditors whose debts are intended to be secured by it. Elmes v. Sutherland, 7 Ala. Rep. 262; Lockhart v. Wyatt, 10 Ala. Rep. 231; Hodge v. Wyatt et al. ib. 271; Pinkard v. Ingersoll et al. 11 ib. 8.

In the assignment made by Henderson to Thomas, we are not advised that any one of the creditors, except Chalmers, was ever informed of its provisions, and he, as we have

seen, expressed his *dissatisfaction*. Now, as there are no facts set out, from which we can imply the assent of the other creditors from the beneficial nature of the assignment, we must regard it as subject to Henderson's right of revocation. This right he exercised in the subsequent transfer, or assignment of the notes to Chalmers. This assignment then to Thomas, so far as disclosed by the cross bill, being inoperative, it follows, that Chalmers cannot date his equity from its creation. If, however, we allow that it was valid as to Chalmers, it was very clear it was abandoned, when the parties entered into new and different stipulations, so far as he is concerned.

The terms in which the agreement is couched, in the answer recited in the cross bill, explained by the subsequent act of Chalmers, in making an absolute disposal of the four notes, in the purchase of property for his own benefit, show that he acquired an interest in the notes, very different from that he possessed under the previous assignment to Thomas. We must intend that he acquired, by the new agreement, the absolute right to dispose of them for his own benefit; or, to use his own language, "he held them free from the control of Henderson, and all other persons." Such right is utterly inconsistent with the original agreement between Henderson and Thomas, so far as we can gather its provisions from the pleadings.

The office of trustee is one of confidence, and Thomas, the trustee, could not have delegated his trust, unless by express provision in the assignment, he was authorized to do so. A sale by him, or by Chalmers, (if he held these notes in trust,) for his own benefit, would amount to a breach of trust, for which they would have been liable to the *cestui que trusts*. Hill on Trustees, 175. Such breach of trust on the part of Chalmers we are not allowed to presume, but the contrary. And having this power to dispose of the notes to Nelson and Hatch, which was not conferred by the original assignment to Thomas, we conclude, he derived it by the agreement made in October, 1840, after the assignment to Dunn, and with a knowledge, as he states, of said previous assignment to Dunn. This subsequent agreement vests his interest, and must control his rights. Pinkard v. Ingersoll,

11 Ala. Rep. 8. It results, as a necessary sequence, from what we have said, that the assignment to Dunn, being prior in point of time to that of Chalmers, his equity is to be preferred, and the notes assigned to Chalmers being sufficient to cover the deductions sought to be enforced by Nelson and Hatch, they must seek their indemnity out of those notes. The injunction then was properly dissolved as to all the amount enjoined, except the $10,667 38, being the amount claimed by Nelson out of the proceeds of the four notes held by Dunn, and as to all but this sum, the decree is affirmed; but for this amount the decree of the chancellor must be reversed, and a decree here rendered, continuing the injunction as to the suit at law upon the last note, and enjoining so much of the judgment at law rendered upon the note last reduced to judgment, as, with the amount of the note in suit, will make the sum of $10,667 38. Let the appellees be taxed with the costs in this case.

BENFORD, GUARDIAN, v. GIBSON, BY NEXT FRIEND.

1. The act of February 18th, 1848, "prescribing and regulating the fees of the judges, and clerks of the county courts of this state," operates, as well on the judges in office at the time of its passage, as on those subsequently appointed.
2. Appointments to public offices, created by a state legislature, are not considered contracts, in the sense of that term, as used in the 10th section, of the 1st article of the constitution of the United States.
3. The legislature of a state may increase or diminish the compensation, allowed its public officers, without any other restraint, than that imposed by its own constitution.
4. The act of February 18th, 1848, "prescribing and regulating the fees of the judges, and clerks of the county courts of this state," does not violate any provision of the constitution of this state, or of the United States.

Error to the Orphans' Court of Dallas. Before the Hon. A. J. Saffold, Judge.

The facts of this case are sufficiently set out in the opinion of the court.

G. W. Gayle, for defendant in error.

The acceptance of the office of judge of the county court, and clerk of said court, completes a contract between the citizen and the state, that the officer will, during the term of his office, discharge all the duties of his office required by law, and that he shall have for the discharge of such duties, the compensation *then* prescribed by law, during the term of his office. Is the acceptance a contract between the state and citizen? A contract is the offer on one side, and an acceptance on the other, for a consideration. The state creates the office, and creates the fees, and holds both out to the community for acceptance. It is the compensation *then* allowed, which induces the acceptance. A state can contract with its citizens. Every act of incorporation is a contract with the citizens, and so held by the courts. See authorities cited in Governor v. Dale, 3 Stew. 387. If the judges and clerks then went into office under a contract to receive, during their term, stipulated fees, the act of 1848, reducing them, violates paragraph 1 of the 10th sec. 1 art. of Con. U. S., which reads—"No state shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." It also violates the19th sec. of the Bill of Rights of the constitution of Ala. which reads, "No *ex post facto* law, nor law impairing the obligation of contracts shall be made." If this be a contract, then, as rights once vested, cannot be withdrawn, the act of 1848 is void. 3 Ark. R. 285; 13 Vermont, 225; Walker's (Mi.) Rep. 146.

The case of Runnels v. The State, decides, that the legislature cannot abolish the office of clerk, and transfer his duties to the judge. This reporter is not in Montgomery, but the decision, doubtless, is, that the clerk had a vested right to the office. If he has, the legislature cannot *abolish* the fees, as that would virtually abolish the office. See Smede's (Mi.) Dig 153, § 2.

The legislature cannot diminish the *salaries* or *compensation* of judges during their term of office. The decisions on this question turn on a provision in the state constitution;

but these constitutional provisions are declaratory merely of their rights, under the provision of the federal constitution. I cite the authorities, as there is much in them, otherwise bearing on this question. 5 Watts & Sergt. 403; 4 Arkansas Rep. 220; 3 Stewt. 387

DARGAN, J.—Benford, the guardian of Gibson, filed his accounts and vouchers, for final settlement, in the orphans' court of Dallas; and one of the charges against the ward, was a bill of costs, amounting to twelve dollars and twenty-five cents, paid to the judge of the county court, as fees, for services rendered. It was admitted, that the services were rendered subsequent to the act of 18th of February, 1848, but were charged in conformity with the act of 1843, and not in accordance with the act of 1848.

The ward objected to the allowance of this account against him; but the objection was overruled, and he excepted. The act of 1848 reduces the fees of the judges of the county courts, and was evidently intended to operate, as well on those judges in office, at the time of its passage, as on those who might be afterwards appointed; and the only question is, whether the act is unconstitutional, so far as it contemplates a reduction of the fees of the judges then in office.

It is contended, that by the acceptance of the office, a contract between the judge and the state was consummated; that he should perform the duties attached to his office, and receive the fees as then regulated by law; and that a reduction of the fees violates the obligations of this contract.

The tenth section of the first article of the constitution, prohibits a state from passing any law, violating the obligations of a contract. But the appointment to office, by a state government, cannot be considered a contract, in the sense of the term, as used in the constitution of the United States.

The creation of offices, and the appointment of officers, to discharge public duties, are indispensible to the administration of the government; and these offices may be *abolished*, and new ones created, as the public good may require; so may the duties be enlarged or diminished, at the will of the legislature, without violating the constitution of the United States. The history of the legislation of all the states,

might be cited in proof of this proposition. But if it be true, that the appointment to office by a state government, creates a contract, between the appointee and the state, then not only have all the states erred, in exercising powers, denied to them; but, what is of more importance, when once the state government is organized, and its officers appointed, it has not the power to remodel, or alter either the duties or the tenure of their officers, without the consent of the incumbents, *however urgent the necessity* of abolishing old offices, and creating new ones, or of increasing or altering the duties of the offices: this prerogative, which ever has been exercised by all governments, as public interest and convenience *requires*, is subjected to the will of the incumbents of office. We cannot believe that such a restraint was intended to be imposed on the state governments, in the exercise of a power, indispensably necessary to the public good. And if a state may abolish an office, without violating the constitution of the United States, or alter the tenure, by which, it is holden, or increase or diminish the duties of the officer, then it is manifest, that the appointment to office cannot be considered a contract; the obligations of which are protected by the tenth section of the first clause of the constitution of the United States; and if not a contract, in the sense of the term, as used in that instrument, then the legislature of a state may increase, or diminish, the salaries, or perquisites of their officesr, as it may seem fit, without any restraint, save that imposed by its own constitution.

In the case of Haynes v. The State, 3 Humph., the supreme court of Tennessee said, the legislature has the power to modify, or reduce the compensation of public officers, during their continuance in office, in all cases, unless such power is taken away by express provision of the constitution of the state; and in the case of The State v. Drew, Charlton's Rep., it is said, that the officers of government have no proprietary interest in their offices, and their duties and *rights* (which are the consequence of their duties,) may be changed, during their continuance in office. So, in the case of Warner v. The State, 2 Denio, 272, chancellor Walworth says, "that if the constitution provides for the appointment of an officer, in a particular manner, the legislaiure cannot create a

new officer to discharge the same duties, and direct the appointment in a different manner, but the legislature may add to or diminish the duties and fees of the officer." Thus holding, that the legislature of a state, in creating offices, and regulating the fees and perquisites of the officers, is restrained by the constitution of the state only. These authorities, in our judgment, lay down the correct rule; and without undertaking to define every contract, the obligations of which would be protected by that clause of the constitution of the United States, we are satisfied, that the appointment to office, by a state government, is not to be considered as a contract, in the sense of that term, as used by the framers of the constitution.

It results from this, that the orphans' court erred in allowing this account, as a charge against the ward, and the decree must be reversed, and the cause remanded.

CORPREW v. ARTHUR ET ALS.

1. A voluntary conveyance is good, as well against subsequent purchasers from the grantor, with notice, as against subsequent creditors, unless it be shewn that it was intended to defraud creditors.
2. If A., an Indian reservee under the Creek treaty of 1832, by arrangement with W. procures his reservation to be certified by the government agent, as sold to W., in order that W. may obtain the patent, and then convey the land in fee simple, to A., it is a fraud upon the government, and a court of equity will not interfere in a controversy between the parties or their assignees.
3. If an Indian reservee under the Creek treaty of 1832, fails to sell and convey his reservation, in five years, in the mode prescribed by the treaty, and at the end of that period manifests no desire to remain in the State, his reservation will revert to and revest in the United States, without an entry or other act on the part of its agents.
4. To convert the grantee of an absolute deed, into a trustee, the evidence should be clear, and satisfactory.

Error to the Chancery Court of the 15th District. Before the Hon. David G. Ligon, Chancellor.

The bill in this case was filed by plaintiff in error, against the defendants, Gideon Arthur and the heirs of John J. Williams, and alledges, that prior to the year 1833, said Arthur, a white man, residing in the Creek Indian territory, now included in the county of Chambers, by intermarriage with a woman of the Creek nation, became identified as a member of said Indian tribe, and as such, under the treaty of 1832, was located on the north half of section of land eleven, in township twenty-two, and range twenty-eight in said county; that about the year 1834, said Arthur and John J. Williams formed a partnership for the purpose of trading with the Indians, and buying their lands; and that with the view of inspiring confidence on the part of the Indians in said Williams, the said Arthur certified to him his said reservation, without consideration or compensation for the same, relying on the good faith of Williams to make him a title, after the patent issued, whenever said Arthur might demand it: that the patent subsequently issued to said Williams: that from the time of Arthur's location on the land till 1843, he resided on, and cultivated it, and that in 1843, having become wholly insolvent, he abandoned the possession, and removed to parts unknown: that said Williams is dead, and that on no occasion in his life time, did he set up any claim to said land, but frequently acknowledged that it was the property of said Arthur: that in 1839 plaintiff had become Arthur's security on several debts due by him—one to Mrs. Elizabeth Gray, for $1,200—one to the Branch Bank at Montgomery, for $280, and divers others, which he is not able to mention: that to secure the plaintiff against his liability for said debts, as well as any future liabilities he should incur for the benefit of said Arthur, the said Arthur on the 28th August, 1830, executed to him a mortgage on the said land: that after the execution of this mortgage, plaintiff became the surety of said Arthur on various other demands, on one of which a judgment has been obtained against him by one Jonathan Bonner, upon which he has paid $111, and will have to pay the additional sum of $104. that to another judgment, in favor of Mrs. Brodnax, he has paid $113 55, to another in favor of Thomas Noble he has paid $40, and to another in favor of John D. Hurst, about $20: that he has also paid to the

sheriff of Chambers $145 25 in a chancery suit of one Whitaker against said Arthur, $31 72, supreme court costs in case of Mrs. Brodnax v. Arthur, and various other demands, which he will prove, when an account may be ordered: that plaintiff is still liable on, and will have to pay the debts due to Mrs. Gray and the Branch Bank, and others of smaller amounts, which, in the aggregate, amount to more than the value of the said land: and that the said heirs of John J. Williams, claim title to said land by descent, and refuse to make title to Arthur, &c.

The prayer of the bill is for a foreclosure of the mortgage, and for an account: for a divestiture of the title of the heirs of said Williams in the land, and that the land be sold, and the proceeds applied to the payment of said debts, &c.

The bill was taken as confessed against Arthur. The heirs of Williams answered, and set up several defence:

1. That Arthur had the land certified to Williams, to enable Arthur to procure a *fee simple* title to it, in fraud of the treaty, and that Corprew had a notice of the issuance of the patent to Williams.

2. That Williams paid Arthur at the time of the certification, $1000, and a vebal agreement was then entered into between them, that Williams was to hold the land and convey it to Arthur, whenever he refunded the money; which he has never done.

3. That by a subsequent arrangment between Williams and Arthur, Williams was to hold the land as security for debts due to him by Arthur.

The evidence establishes the first ground of defence, but was conflicting as to the third and fourth grounds; and as the opinion of the court rests mainly on the first ground, and other facts in the case, without reference to the conflicting testimony, it is deemed unnecessary to insert it.

The chancellor dismissed the bill, which is now assigned as error.

Heydenfeldt, for plaintiff in error.
Rice, contra.

COLLIER, C. J.—It may be conceded, that a convey-

ance, without valuable consideration, by one indebted at the time, is fraudulent at law against *existing creditors*, and the *intention of the donor* determines the validity of such conveyance as against *subsequent creditors*. Cato v. Easley, 2 Stew. Rep. 214; Miller v. Thompson, 3 Port. Rep. 198; Hanson v. Buckner, 4 Dana's Rep. 251.

Our statute of frauds, in declaring the effect of fraudulent conveyances, substantially embodies the provisions of the 13th and 27th Eliz. Although, in respect to the first, it is settled that the intention of the parties is the ruling point in determining the validity of a voluntary conveyance as against the subsequent creditors of the grantor, yet the modern English decisions maintain that such conveyance is void under the 27th Elizabeth, against a purchaser for a valuable consideration, though he have notice of its existence. Upon a former occasion, I said it was doubtless the design of the latter statute to avoid transfers of property intended to defraud purchasers, and the *quo animo* a gratuitous transfer of property was made, was always a material inquiry; and if there was no fraud in fact, it should be upheld against a purchaser with notice. See my opinion in Frisbie v. McCarty, 1 Stew. & P. Rep. 68. In Cathcart et al. v. Robinson, 5 Pet. Rep. 264, it was said, "that the supreme court of the United States, in expounding a statute, adopted the construction of the courts of the country where the statute was enacted; but this rule may be susceptible of modification, when applied to British statutes adopted in any of the American states. By adopting them, they become our own, as entirely as if they had been enacted by the state. The construction which British statutes had received in this country —indeed to the time of the separation of this country from the British empire, may very properly be considered as accompanying the statutes themselves, and forming an integral part of them. But however subsequent decisions may be respected, their absolute authority is not admitted. If the English courts vary their construction of a statute which is common to both countries, we do not hold ourselves bound to fluctuate with them. At this day in England, a voluntary conveyance is held to be absolutely void, under the statute of the 27th Elizabeth, against a subsequent purchaser, even

although he purchased with notice. These decisions do not maintain that a transaction valid at the time, is rendered invalid by the subsequent act of the party: they do not determine that the character of the transaction is changed; but that testimony afterwards furnished, may prove its real character. The subsequent sale of the property is carried back to the deed of settlement, and considered as proving that deed to have been executed with a fraudulent intent to deceive a subsequent creditor."

"At the commencement of the American revolution, the construction of the 27th Eliz. seems not to have been settled in England. The leaning of the courts towards the opinion, that every voluntary settlement would be deemed void as to a subsequent purchaser, was very strong; and few cases are to be found in which such conveyance has been sustained. But these decisions seem not to have been made on the principle that such subsequent sale furnished a *strong presumption* of a fraudulent intent; which threw upon the person claiming under a voluntary conveyance, the burden of proving it, from the conveyance itself, or from extrinsic circumstances, to be made in good faith; rather than, as furnishing *conclusive evidence*, to be repelled by no circumstances whatever. The modern English decisions, (add the court,) which establish the conclusiveness of a subsequent sale to fix fraud upon a transfer or settlement of property, made without valuable consideration, seem to the court to go beyond the construction which prevailed at the revolution, and not proper to be followed in this country." See Sugden on Vend. 474 to 479. The English construction, it must be admitted, has been adopted in some of the states. Ricker v. Ham, 14 Mass. Rep. 137; Clapp v. Tirrell, 20 Pick. Rep. 247; Barrineau v. McMurray, 3 Brev. Rep. 204; Tate v. Liggatt et al. 2 Leigh's Rep. 84; Bell et al. v. Blaney, 2 Murp. R. 171.

We have never adopted the provisions of the 13th and 27th Eliz. *in extenso*. Our statute of frauds, declares that every gift, grant, or conveyance of lands, tenements or hereditaments, goods or chattels, &c., had of malice, fraud, &c., to the intent or purpose to delay, hinder or defraud creditors of their just and lawful actions, &c.; or to defraud or to deceive

those who shall purchase the same lands, tenements or hereditaments, &c.; "shall be from henceforth deemed and taken only as against the person or persons, his, her, or their heirs, successors, executors, administrators or assigns, and every of them whose debts, suits, demands, estates, or interests, by such guileful and covinous devices and practices as is aforesaid, shall, or might be in any wise disturbed, hindered, delayed or defrauded, to be clearly and utterly void; any pretence, color, feigned consideration, expressing of use, or any other matter, or thing, to the contrary notwithstanding." Clay's Dig. 254, § 2. This statute was enacted in 1803, before the English decisions to which allusion has been made settled the interpretation of the 27th Eliz. according to the rule, as at present acknowledged. This consideration, and the difference of phraseology in the several enactments, leave us free to adopt such construction of our own act as may best comport with the language employed, and most certainly advance the legislative intention. These ends, we incline to think, can only be subserved by holding, that one who purchases for a valuable consideration, *with notice* that his vendor had made a previous voluntary conveyance, will not be preferred. But we pass from this point, for the present.

By the treaty of the 24th March, 1832, the Creek tribe of Indians ceded to the United States, all their lands east of the Mississippi river. The United States stipulated to survey this land as soon as it could conveniently be done, and when surveyed, to allow ninety principal chiefs of the tribe, to select one section each, and every head of a Creek family to select one half section each, "which tracts shall be reserved from sale for their use, for the term of five years, unless sooner disposed of by them," &c. It is further provided, that "these tracts may be conveyed by the persons selecting the same, to any persons, for a fair consideration, in such manner as the president may direct. The contract shall be certified by some person appointed for that purpose by the president, but shall not be valid till the president approves the same. A title shall be given by the United States, on the completion of the payment." It is also declared, that "at the end of five years, all the Creeks entitled to these se-

lections, and desirous of remaining, shall receive patents therefor, in *fee simple* from the United States."

Under this treaty, it has been holden that the enrolment of the name of the head of a Creek family, the allotment to him, and his location as such, of a half section of land, conferred *prima facie* a legal estate, on which the reservee might maintain an action for the recovery of the possession, against an intruder. The title thus acquired was to continue for five years, unless it was sooner conveyed, with the approval of the president; but if there was no such conveyance, it reverted to the United States, unless the reservee, or his heirs, were desirous of remaining in the country after the expiration of that period. By the treaty, all the title of the Indian tribe was relinquished to the federal government, and the government were to grant to each head of a family a *fee simple* in the quantity of land designated, defeasible on the happening, or rather the not happening, of the events specified. If the reservee did not alienate within the five years, or upon the expiration of that time make known his intention to remain in the country, the land re-vested in the United States, without an entry, or other act, on the part of its agents. These conclusions were attained upon a construction of the treaty, and was enforced by the subsequent legislation of Congress upon the subject. See Wells v. Thompson, 13 Ala. Rep. 793, and citations by the court. See Clarlitko v. Elliott, 5 Port. Rep. 403; Rosser v. Bradford, 9 ib. 354; Herring v. McElderry, 5 ib. 161.

The sale by Arthur to Williams, if intended not to transfer the absolute right to the vendee, but merely to divest the title of the United States, that the vendor might occupy or dispose of it, unincumbered by any condition, was in direct violation of the treaty. Or the object of the parties was to deceive other reservees by holding out a false lure, and thus induce them, under the influence of Arthur's example, to sell their reservations to Williams, that the latter might derive a profit from the purchase. In either case, the contract would be *contra bonos mores*; and a court of justice would not lend its aid to the vendor to vacate his conveyance; in such case, the rule *in pari delicto, potior est conditio possidentis*, applies with all force. Public policy inhibits the enforcement of

contracts in violation of positive law, or which are founded in a fraud upon the rights of others, and are opposed to good morals. Roberts v. Gibson, 6 H. & Johns. Rep. 116; Carrington v. Caller, 2 Stew. Rep. 175; Boyd v. Barclay, 1 Ala. Rep. N. S. 34. The contract between Arthur and Williams, according to the testimony of some of the witnesses, is obnoxious to both the objections supposed; and the bill itself expressly alledges the second, as a ground why the conveyance should be set aside. There can, then, be no doubt, that if the principle we have stated be adhered to, the sale by Arthur cannot be set aside at his instance, and that Williams cannot be treated as a trustee, holding for his benefit.

Let it be conceded, that the mortgagee is a creditor by specialty, (Coote on Mortg. 457); and that he is also a purchaser within the 27th Elizabeth, so as to avoid a prior voluntary settlement under that statute, (Id. 355), and still the complainant is not entitled to the relief he seeks against the heirs of Williams. It is not pretended that the complainant was a creditor of Arthur, until long after he conveyed his reservation, and it is perfectly certain, that he had no lien upon it; even if it was competent for a reservee to sell, or incumber it, otherwise than the treaty provides, or of his defeasible estate, was subject to levy and sale under execution. James v. Scott, 9 Ala. Rep. 579. And as a subsequent purchaser, he cannot claim the right to subject the land to the payment of his demands, without showing that the conveyance was not only voluntary, but was intended to defraud creditors. Griffin v. Doe ex dem. Stoddard and Murphy, 12 Ala. Rep. 783. The bill makes no such allegation, and if it did, it would not be supported by the proof.

The heirs of Williams cannot be treated as trustees for the complainant, considering him as a purchaser. If the purchase of their ancestor is sustained, then they will hold in their own right; for it will not be upheld for the benefit of those, who deduce a paramount claim through the vendor. The most that the complainant can ask is, that the deed under which the defendants claim title, be annulled, and that the interest which Arthur would have under such circumstances, be subjected to the satisfaction of his claims against the latter.

If we lose sight of the conveyance by the reservee to the plaintiff, it is clear, upon the authority of Wells v. Thompson, *supra*, thebill itself shows he has no title. He had the right to sell and convey a fee-simple within five years, in the manner prescribed by the treaty; if he failed to do this, and at the end of five years, manifested no desire to remain in the country, his reservation reverted to the United States. No act on the part of the government was necessary to re-invest it, with all the title which was ceded by the treaty. See University v. Winston, 5 Stew. and P. Rep. 17; Gill v. Taylor, 3 Port. Rep. 182; Kennedy & Moreland v. McCartney's heirs, 4 Ib. 141; Crommelin v. Minter, et al. 9 Ala. Rep. 594; Wells v. Thompson, *supra*.

The United States has recognised the conveyance of the reservee as passing all the interest which the treaty authorized him to transfer—its effect was to divest his estate, so as to leave nothing to be reached by creditors, or subsequent purchasers. If the patent was obtained by a fraud upon the United states, perhaps the government may assert its right to the reservation, as forfeited, and obtain a decree to vacate the patent. However this may be, neither the bill, or proofs, present a case which entitles the complainant to a decree of foreclosure against the heirs of Williams, or show any interest in the mortgagor.

We have thus seen that the law of the case, is against the complainant; and we are inclined to think if it were otherwise, the bill is not sustained by the proofs. The evidence required to make out a trust, or a fraud, so as to convert the grantee of an absolute deed into a trustee, or to annul the deed, should be clear and satisfactory. So far from establishing that Williams had advanced no money to Arthur, for the reimbursment of which he was to hold the land, we are inclined to think that the most reliable proof, (judging from the manner in which the witness express themselves, and the circumstances under which they acquired a knowledge of the facts they narrate,) tend rather to establish the reverse. The view we have taken, does not require us to examine the facts. Our conclusion is, that the decree must be affirmed.

CHILTON, J., not sitting.

THE STATE v. STEPHEN, A SLAVE.

1. Upon the indictment of a slave, for the murder of a white man, a finding by the jury, that the prisoner is "guilty of voluntary manslaughter," is sufficient to authorize the court, to sentence the slave to the punishment of death.

Error to the Circuit Court of Sumter. Before the Hon. George Goldthwaite.

THIS was an indictment against the plaintiff in error, for the murder of William Hadden, a white man. On the trial the jury returned the following verdict: "We, the jury, find the defendant Stephen, a slave, guilty of voluntary manslaughter." The counsel of the accused moved in arrest of judgment, on account of the defect in the verdict; but the court overruled the motion, and pronounced sentence of death on the accused. The judgment of the court is now assigned as error.

HUNTINGTON, for plaintiff.
ATTORNEY-GENERAL, for the State.

CHILTON, J.—The prisoner was tried and convicted upon an indictment, charging him with the murder of one William Hadden, a white man. The jury returned their verdict as follows: "We, the jury, find the defendant guilty of voluntary manslaughter." The only question is, whether this verdict of the jury is sufficient to authorize the court to pronounce sentence upon the prisoner? We are clearly of opinion that it is.

In Nancy, a slave, v. The State, 6 Ala. Rep. 483, this court held, that the omission of the jury to find the entire charge, if it is sufficiently certain in ascertaining the guilt of the prisoner, as to any one offence which is included in the charge laid in the indictment, will not vitiate. In that case, as in this, the jury found the lesser offence, and their verdict was, that the prisoner was guilty of an assault with intent to

kill, without stating, "as charged in the bill of indictment." This court say, it would seem absurd to conclude that the jury found any other assault than that named in the indictment. The facts of the case from which I have quoted, and the opinion of the court seem so apposite to the case at bar, as to render a further examination unnecessary. That case was well considered, and we are satisfied the court states the law correctly. Our conclusion is, that the judgment must be affirmed, and that sentence of death upon the verdict, be here pronounced against the prisoner, in accordance with the statute.

MELTON v. TROUTMAN.

1. If a part of a deposition is legal, and a part, illegal evidence, and a party object to it as a whole, it is not error in the court to overrule the objection. In such a case it is the duty of the objecting party to point out the particular portion of the testimony that he deems illegal.
2. In an action for vexatiously sueing out an attachment, it is competent for the defendant to prove, in mitigation of damages, that the plaintiff was indebted to him in Georgia, and that he ranaway from that State with his property to avoid the payment of his debts.
3. Where the defendant in an attachment suit, brings an action vs. the plaintiff for maliciously suing out the attachment, and offers in evidence, in connexion with the answers of such plaintiff, to interrogatories filed in said suit, under the statute, the interrogatories and *his own affidavit* therein, for the purpose of explaining the answers, without pointing out the necessity of any explanation, or the particular part relied upon for the purpose, the court may properly reject the whole.

Error to the Circuit Court of Talladega. Before the Hon. S. Chapman.

Action on the case, by Melton against Troutman, for wrongfully, vexatiously and maliciously suing out an attachment, returnable to Shelby circuit court. The attachment

was sued out for the sum of $2,300, but the verdict and judgment were for $1,201 only; the claim having been reduced by proof that usury entered into the consideration of the note, on which the attachment was founded.

At the trial, the defendant offered the deposition of one Jones, who stated, with other matter, that the plaintiff resided in Georgia, from 1832 until 1842; in the month of February, of which latter year, he left, under very suspicious circumstances; having runaway with his property, to avoid the payment of his debts. When he left he was indebted to the defendant in the sum of $2,000 or upwards, as he told the witness. The plaintiff objected, *generally*, to all the answers, as containing irrelevant testimony, but especially that part just stated. The court allowed the deposition to be read.

The plaintiff, afterwards, in the course of the trial, offered, as rebutting testimony, to read certain answers of the defendant, to interrogatories propounded to him in the attachment suit, and offered with said answers, so much of the statement made by him as the foundation for the interrogatories, and so much of the interrogatories as were necessary to the understanding of the answers. The statement asserted usury in the consideration of the note, on which the attachment suit was founded, as well as payment of particular sums of money in liquidation of all, or of a portion of what was due.

The court refused to allow any part of the plaintiff's statement, or the interrogatories to be read, but ruled that the answers might be read by the plaintiff.

The plaintiff excepted to the rulings of the court, and they are now assigned as error.

Morgan, for plaintiff in error.

1. The answer of Jones to the 5th interrogatory, was irrelevant, and was calculated to prejudice the rights of the plaintiff.

2. It will be seen that Troutman's answer to interrogatories propounded to him, refers, directly to the affidavit made by the plaintiff, and admits all the facts therein stated, which are not contradicted in the answer. The reference to the affidavit, made it a matter of evidence, and the court erred in excluding it from the jury.

S. F. Rice and L. E. Parsons, contra.

1. When legal testimony is united with and offered together with illegal testimony, as a whole, the court is not bound to separate the good from the bad, but may reject the whole. Smith v. Zaner, 4 Ala. Rep. 99.

2. Where a motion is made to exclude all the testimony given by a witness, a part of which is admissible, the court is not bound to distinguish the legal from the illegal evidence, but may overrule the motion *in toto*. Hrabrowski v. Herbert, 4 Ala. Rep. 265; Litchfield v. Falconer, 2 ib. 280. As to usury, see Kirksey v. Jones, when last here.

DARGAN, J.—It is the duty of a party objecting to evidence, to point out with certainty, the evidence he deems objectionable. If it is offered by way of deposition, and the objection is to the whole deposition—the whole must be illegal, or there is no error in admitting it. If a part of the deposition only is illegal, the objection must point out the illegal part, and if it does not, the court may overrule the objection. 4 Ala. 265; 2 ib. 280.

Any other rule of practice, than this, would lead to results that would be intolerable, as it would impose on the court, in the midst of the trial, the necessity of suspending it, and examining the whole deposition, and excluding such portions as the judge might deem illegal, although in the opinion of the party objecting, the portion excluded by the court, might be legal. So, too, a party offering testimony, some of which is legal, and some illegal, if the court reject the whole, it is not error, for it is the duty of the party offering the testimony, to separate the legal, from the illegal, and if he will not, the court may reject the whole. Smith v. Zaner, 4 Ala. 99; Elliott v. Pearsall, 1 Peters, 328.

When, too, exceptions are taken to the ruling of the court below, in excluding testimony, the exception should point, with sufficient certainty, to the testimony rejected, to enable this court to ascertain the character of the testimony, and determine whether it is legal, or illegal.

Guided by these general rules, we can find no error in the record. The objection was to the whole of the deposition of Jones, when it is certain that portions of it were legal testi-

mony, at least for the purpose of showing, that the defendant was not actuated by malice, in suing out the attachment. One of the counts in the declaration, alledges, that the attachment was vexatiously sued out. Under this, he was entitled to vindictive damages, if the defendant had procured the issuance of the process maliciously. McCullough v. Walton, 11 Ala. 472; Donnell v. Jones, 13 Ala. 490.

2. The plaintiff, who was the defendant in the attachment suit, filed interrogatories to the defendant, for the purpose of proving, that the note on which the attachment was issued, was usurious. And in order to obtain an order of the court, allowing the interrogatories to be filed, he made oath, in conformity with the statute, setting out the facts constituting the usury. The defendant answered these interrogatories, and they were returned to the court in which the attachment was pending. The plaintiff, by way of rebutting proof, offered to read the answers of the defendant, taken in that suit, together with so much of the interrogatories, and the affidavit made by the plaintiff to obtain the order allowing them, as was necessary to understand the answers, but did not point out what interrogatory, or what part of the affidavit, was necessary for this purpose; but the answers, interrogatories, and affidavit, were all offered at once. The court decided that the answers might be read, but rejected the affidavit of the plaintiff, and the interrogatories.

We will not consider whether an interrogatory, which has been answered, may not become evidence for the purpose of explaining the answer, and to give it its full force and effect; but it is very certain, that when a mass of written evidence is offered, some of which is not admissible, and it is only said, that so much is offered, as will explain some evidence that is legal, without pointing out the necessity of any explanation, or what particular part is relied on for this purpose, the court may reject the whole. If there was any necessity for reading any one of the interrogatories, for the purpose of explaining the answer, the party offering the interrogatory, should have pointed it out to the court below. As he did not do so, the court properly rejected both the affidavit of the plaintiff, and the interrogatories.

It is, however, now contended, that the answer admits

material facts in the affidavit of the plaintiff to be true, and thus the affidavit of the plaintiff is legal proof against the defendant. If the affidavit of the plaintiff, had been offered as evidence in the court below, because it had been admitted to be true, we think the circuit court would have allowed it to go to the jury. But it does not appear from the record, that it was offered as evidence on that ground, but solely on the ground of explaining the answers. We have, however, looked both to the answer, and the affidavit, and we find nothing admitted in the affidavit, that is not distinctly stated in the answer, by reading which, the plaintiff would have obtained the full benefit of every fact, admitted in the affidavit to be true.

There is no error in the record, and the judgment must be affirmed.

WEAVER v. YEATMANS.

1. The declarations of one in possession of personal property, tending to impugn the validity of a deed of trust, which he had previously executed, and under which the claimant, (against whom the testimony is offered,) deduces his title, is inadmissible.
2. The declarations of a vendor are not admissible evidence against his vendee, without first establishing facts, from which an inference may fairly be deduced, that there was a combination between vendor, and vendee, to defraud the creditors of the former.

Error to the Circuit Court of Pickens. Before the Hon. Samuel Chapman.

This was a trial of the right of property in a quantity of seed cotton, levied on under an execution in favor of the defendants in error, against one Alanson Brownlee, and to which a claim was interposed by the plaintiff in error.

The plaintiffs in execution having made out a *prima facie* case, rested, when the claimant introduced testimony, con-

ducing to show, that he purchased certain negroes, early in the year 1847, at a trust sale made under a deed of trust, which said Brownlee, who was the son-in-law of the claimant, had theretofore executed: that he took possession of the negroes so purchased, and delivered them on the same, or the next day, to said Brownlee, in the capacity of overseer for him, with instructions to him to make a crop with them for the claimant the ensuing season, on the premises on which said Brownlee lived, and had lived for some years before, saying to him at the time, that if he made a good crop, he would pay him well, otherwise, not so much, and that the cotton in controversy was part of the crop made by said negroes. The plaintiffs in execution then offered evidence, tending to prove, that Brownlee had been in possession of, and had controlled said negroes, for some eight or nine years previous to the trust sale, and that there was no apparent difference in the possession, or management, of said Brownlee, of said negroes and of the plantation, after the alledged purchase by the claimant. The plaintiffs in execution also offered a witness to prove, that in the year 1847, after the purchase by claimant, but while the negroes were in Brownlee's possession, said Brownlee made certain declarations, touching the deed of trust, to the effect that it was fraudulent, and made to hinder and delay his creditors, with the privity and knowledge of the claimant. To this the claimant's counsel objected, but the court overruled the objection, and permitted the evidence to go to the jury. Other declarations of Brownlee, of the same character, and made during the same year, were allowed to go to the jury in opposition to the objection of the claimant.

To the rulings of the court, the claimant excepted, and now assigns them as error.

Bliss & Baldwin, and Porter, for plaintiff in error.

1. The court will intend, that the trust sale was a public sale—that being the usual mode of selling property under deeds of trust. The remaining in possession of the negroes, or rather, the resumption of the possession of them, did not raise any presumption of fraud. Simerson v. Branch

Bank of Mobile, 12 Ala. R. 205, and cases cited; Andrews & Bro. v. Jones et al. 10 ib. 400.

2. That the declarations as to the fraud in the sale were not admissible as parts of the *res gestæ*, nor were they parts of the *res gestæ;* and this whether the sale were public or not, within the language of McBride and wife v. Thompson, 8 Ala. 653.

3. The chief point is, as to whether the declarations of Brownlee were so far parts of the *res gestæ* as to be admissible. They were not definitely stated, nor did the time, at which made, have reference to any lien, or expected lien, of the creditor. As allowed to be given to the jury, they were calculated to mislead them, because of their generality, and indefiniteness as to period. McBride v. Thompson, 8 Ala. 653; 1 Greenl. Ev. § 108, note 2. If a fraudulent combination had been proved, these declarations might have been given in, to the binding of the claimant; but he was not present, and the declarations were as to what he knew. 2 Paige, 482. The declarations were merely narrative of a past transaction, and could not be received as proof of such transaction. Greenl. Ev. § 110.

Huntington, contra.

The testimony, as it is set forth in the bill of exceptions, discloses clearly, that there was a combination between the plaintiff in error and the defendant in the execution, to defraud the creditors of the latter. The fact, that the defendant in execution remained in possession of the property, after its purchase at the trust sale by his father-in-law; that there was no difference between its control and management, before and after the sale—is of itself a proof of fraud, which is made only the more glaring, by the circumstance that the defendant in execution was professedly the overseer under the nominal contract, that if he made a good crop, he was to be well paid, and if an indifferent crop, not so well. This, in fact, is no contract at all, and there is therefore nothing to relieve the possession of the defendant in execution from its *prima facie* fraudulent character. In the case of Borland v. Mayo, 8 Ala. 112, it is decided, that the declarations of a conspirator are admissible against his fellow; also, that

where there is proof tending to show fraud on the part of a purchaser of property, and a community of design with his vendor, in such case, when the contest is between the former, and the creditor of the latter, the declarations of the vendor are admissible against his vendee; also, that when the vendor is left in possession of property, and exercises acts of ownership over it after sale, this proves a combination to defraud creditors, and the declarations of the vendor are admissible as evidence against his vendee. This being the state of the present case, the admissibility of the declarations of the defendant in execution, rests upon a different, and more general rule, than that laid down in McBride v. Thompson, and it is therefore insisted, that there is no error in the judgment of the court below.

COLLIER, C. J.—In McBride & wife, et al. v. Thompson, 8 Ala Rep. 650, it was decided that the declaration of a party in possession are admissible as part of the *res gesta;* but are not to be received as evidence to every conceivable extent. "While it is allowable to prove statements of one in possession, and explanatory thereof, it is not permissible to show every thing that may have been said byhim in respect to the title; as that it was acquired *bona fide* and for a valuable consideration; was paid for by the money of a third person, or his own, &c. This we have seen. instead of being part of the *res gesta*, would be sometheng beyond, and independent of it"—the *res gesta* being the continuous possession of the declarant. The declarations of the defendant in execution, which were admitted by the circuit court, were not restricted to an assertion by him, that he held the slaves as his own property, or under the claimant. They extended beyond this and impugned the validity of a deed of trust, which he had previously executed, and under which, the claimant sought to deduce a title as purchaser. Such testimony transcended the limit laid down in the case cited, and its admissibility cannot be defended upon the ground that it was part of the *res gesta.*

The declararion that the claimant "had got the crop fixed, so that they (his creditors) could not get it," was alike foreign

to the *rss gesta*, and should not have been received as explatory of the *subject matter* or *thing done.*

It is however, insisted for the defendant it error, that the proof in the case shows that there was a combination between the claimant and defendant in execution, to defraud the creditors of the latter, and for that reason the declarations, though beyond and independent of the *res gesta*, were properly admitted. To sustain this argument, we have been referred to Borland v. Mayo, 8 Ala. Rep. 104. In that case one of the questions was, whether the declarations of Walker, the vendor, were admissible against Borland, his vendee. We said, "The declarations of a conspirator are admissible against his fellow. Phil. Ev. C. & H's notes, 177, and cases cited. So where there is proof tending to show fraud, on the part of the purchaser of property, and a community of design with his vendor, it has been held that in a contest between the former and the creditors of the latter, the declarations of the vendor, are admissible against his vendee. Clayton v. Anthony, 6 Rand. Rep. 258; Reitenbach v. Reitenbach, 1 Rawles' Rep. 362. And it has been decided where the vendor is left in possession of property, and exercises acts of ownership over it after the sale, this proves a combination to defraud creditors, and the declarations of the vendor, are evidence against his vendee. Wilber v. Strickland, 1 Rawles' Rep. 428; Willies v. Farley, 3 Car. & P. Rep. 395; 2 Phil. Ev. C. H's notes, 178, 601-2. The testimony shows that the integrity of the transaction between the defendant in execution, and the claimant was at least questionable, and that there was no ostensible change of possession. This being the case, the proof of Walker's declarations comes within the principle upon which the authorities cited rest, and are admissible against his vendee, if competent evidence under the circumstances."

In the case at bar, the testimony shows, that the slaves by whose labor the cotton in question was produced, were purchased by the claimant early in 1847, ata sale under a deed of trust previously executed by the defendant in execution; that the claimant took possession of the slaves, but afterwards, on the same or the succeeding day, delivered them to the defendant, as an overseer, to make a crop for him (claim-

ant) during the year 1847, on the plantation where the defendant had resided for several years—saying, that if he made a good crop, he, claimant, would pay him well; but if he failed, he should not be paid so much. The proof shows that the defendant in execution had owned and controlled the slaves, for eight or nine years, and that there was no material change in their management after the claimant's purchase, or in the conduct of the plantation.

The evidence does not indicate there was any unfairness in the sale at which the claimant purchased. It shows that there was an *actual change of the possession*, by a delivery of the slaves to the claimant, by the trustee. Having acquired the possession under his purchase, it cannot be assumed that the contract which the claimant subsequently made with the defendant in execution, to take charge of them for a year, and make him a crop as an overseer, was indicative of a conspiracy between them for the claimant to hold the slaves fraudulently, against the defendant's creditors. Such an inference cannot be predicated of the fact, that the defendant was the claimant's son-in-law. If the defendant was competent to manage the slaves for the interest of the claimant, the relationship might, with propriety, have furnished an additional inducement for his employment—certainly, it was no reason why his services should have been rejected. The fact that there was no known change in the mode of conducting the planting operations, proves nothing adverse to the *bona fides* of the transaction between the claimant and the defendant. Nor can any unfavorable deduction be made, because the compensation to the defendant was not explicitly stipulated—it was enough that the claimant promised to pay him well if he made a good crop, and less if he failed. This is quite enough to show that his services were not gratuitously rendered, and that he was entitled to demand as much as they were worth. This view of the facts, sufficiently establishes that the case is distinguishable from the case of Borland v. Mayo. There, the evidence disclosed facts which, *prima facie*, indicated a combination to hinder creditors in the collection of their demands, and a ground was thus laid for the introduction of the independent declarations of the vendor. But here there is nothing upon which the court could rest such a predicate,

and it was therefore incompetent to permit the declarations. The court must be able to infer that the basis was laid, and could not admit the declarations, and tell the jury to disregard them, if there was no combination. It follows from what we have said, that the circuit court erred. The judgment is consequently reversed, and the cause remanded.

LOWE'S ADM'R v. JONES.

1. When the statute of non-claim begins to run, it will continue, notwithstanding the administrator removes from the State, and continues absent, until the bar is perfect.
2. An administrator died within two months after grant of letters to him, and after a considerable time, a successor was appointed, to whom, fourteen months after his appointment, presentment of a claim was made: Held, that although there were but sixteen months during which there was an administrator in existence, to whom the claim could be presented, yet, as more than eighteen months had elapsed from the time the statute began to run, the bar was complete.

Error to the Circuit Court of Madison. Before the Hon. G. W. Lane.

Action of debt, by defendant in error, against Ferdinand L. Hammond, administrator on the estate of George A. Lowe, the plaintiff in error, on two bills single, executed by one Key and the said Lowe in his life time; one dated the 10th, and the other the 11th December, 1830, and payable one day after date. The writ issued on the 5th August, 1846. The administrator pleaded in short, by consent, that on the 9th day of July, 1838, letters of administration were granted on the estate of his intestate, by the county court of Madison, to one David Lowe, who then and there qualified as administrator, and that the bills single were not presented to said David, nor to his successor, the present administrator, within eighteen months, &c.

The defendant in error replied in short, by consent, "that said David Lowe, administrator as aforesaid, immediately after obtaining his letters of administration as aforesaid, and qualifying as administrator, left the State of Alabama, and within two years after he obtained said letters, departed this life, without returning to this State, and that no successor of said David Lowe, in said administration, was appointed until the grant of letters to the defendant, on the 7th day of July, 1842; and that the bills single, in the declaration mentioned, were presented to him on the 8th September, 1843." To this replication, the plaintiff in error demurred; but his demurrer was overruled, and this is now assigned as error.

Robinson, for plaintiff.

The fact set up in the replication, the absence of the administrator from the State, is not sufficient to prevent the bar of the statute of non-claim, relied on in the plea. Branch Bank at Decatur v. Donelson, adm'r, 12 Ala. Rep. 741.

S. Parsons, for the defendant.

The statute of non-claim ought not to be a bar in this case, because the administrator, forthwith after his appointment, left the State, and remained away until he died. He thus prevented a presentation by his own act; and like an endorser in similar cases, should not claim advantage of his own act. The statute of non-claim was not intended to have effect in cases where a presentation is impracticable, for any cause, not attributable to the creditor; especially if it arise from the act of the administrator. Angel on Lim. 1st ed. 290; Hemmenway v. Gates, 5 Pick. 321; Hutchinson v. Tolls, 2 Porter, 44.

CHILTON, J.—The error assigned in this case, is, that the circuit court overruled a demurrer to the replication of the plaintiff, to the plea of the statute of non-claim.

The replication which is pleaded in short, by consent, avers "that the said David Lowe, administrator as aforesaid, immediately after obtaining his letters of administration as aforesaid, and qualifying as such administrator, left the state of Alabama, and within two months after he obtained his

said letters of administration, died without returning to this State; and the plaintiff further says, that no successor of said David Lowe, in said administration, was appointed, until the grant of letters to the defendant, on the 7th day of July, 1842, and that the bonds described in the plaintiff's declaration, were presented to the defendant on the 8th day of September, 1843."

It appeared by the plea, that letters of administration were granted on the estate of David Lowe, on the 9th day of July, 1838; so that more than four years elapsed from the first grant of letters, to the time of presenting the claim.

The statute declares, that claims shall be presented within eighteen months after the grant of letters, &c. Digest, 195, § 17. But it is insisted by counsel, that the statute did not run, as the administrator, immediately after his appointment, left the State. This point is concluded by the decision of this court, in the case of the Branch Bank at Decatur v. Donelson's adm'r, 12 Ala. Rep. 741.

Another question, however, comes up. It is this. The first administrator died within two months from the grant of letters to him. His successor had been appointed only fourteen months before the presentation of the claims, and adding the two months of the first administration to the fourteen of his successor, they make only sixteen months during which there was an administrator in existence, to whom the presentation of the claims in suit could have been made. Should the intervening time, when there was no administrator upon the estate, be counted, in computing the time for the statutory bar?

The general rule, in respect to the statute of limitations, undoubtedly is, that when it once begins to run, it continues, notwithstanding an intervening disability to sue. The same rule, by analogy, we think, should apply to the statute of non-claim. It is true, that exceptions have, by a kind of judicial legislation, been engrafted on this rule, and which have been so long and uniformly acted upon, as to become authoritative upon the courts. But we are not disposed to carry these exceptions further than they have already been settled by previous adjudications. The case at bar does not fall within any of them. The statute is peremptory, and

makes no saving or exception in cases where the administrator leaves the State or dies. One of the objects of its enactment was, doubtless, to speed the settlement of the estates of deceased persons, and to compel the presentation of claims against estates at an early period after the grant of letters, when the persons interested in contesting them would be the better able to test their justness, and to adduce their proof. The construction which we place upon it, favors this object, and certainly conforms to the letter of the statute.

The case of Hemenway v. Gates. 5 Pick. Rep. 321, was decided upon a statute of Massachusetts, which we have not been able to find, limiting the time of bringing actions against administrators, to four years. The court held, that the administrator, *de bonis non*, could not connect his administration with that of the original administrator, who had died, so as to make out the four years, but must himself have been administrator for four years from the grant of letters to him. However correct the decision may be, as a construction of their statute, we do not regard it as an authority requiring the construction contended for of our statute of non-claim. Were such rule adopted here, where administration of estates are so often changed, the whole policy of the act would, in many cases, be defeated; for if none of the previous administrators had retained their fiduciary character for eighteen months, the statute would create no bar, though twenty years had elapsed from the first grant of letters. It would thus often happen, that the statute of limitations would bar a claim, which would not be barred by the statute of non-claim, although the latter statute requires the lapse of only one-fourth the time required by the former to render the bar complete.

The exclusion of the six months, within which time no suit is allowed to be brought against an administrator after grant of letters to him, in computing the time required to perfect a bar under the general statute of limitations, seems to result as a consequence of the statute. The plaintiff in such case, could not, by any act of his, assert his remedy in the six months which are thus excluded. Not so in regard to the statute of non-claim. The creditor can have an administrator appointed, or can apply himself in certain cases,

so that there is no impossibility as to the presentation of his claim, when he has it in his power to render it practicable. And in this consists the distinction between the case at bar and the case cited by the counsel, of Hutchison v. Tolls, 2 Porter's Rep. 44.

Our conclusion is, that the replication was bad, and the demurrer should have been sustained. Let the case be reversed and remanded.

COGBURN AND POWELL v. SPENCE AND ELLIOTT.

1. The bankrupt act of 1841, does not restrain a creditor of one, who has availed himself of its benefits, from suing on his demand, but merely arms the bankrupt with a complete defence to the suit, until it is shown that his certificate was obtained by fraud, or that the debt comes within some one of the exceptions, mentioned in the act.
3. If a creditor of one, who has taken the benefit of the bankrupt act, has reduced his debt to judgment, before the bankrupt obtains his certificate of final discharge, he will not be compelled to bring a new suit on the judgment, but may cause execution to issue thereon, subject to be set aside or quashed on the application of the bankrupt.
3. An execution, issued on a judgment, which has been rendered against a bankrupt, before he obtains his certificate of final discharge, is not void, but voidable only, at the instance of the bankrupt.
4. An execution, which is voidable only, and not void, affords full and ample protection to the officer, who obeys its mandate.
5. A voidable execution, until avoided, is a protection to the party, at whose instance it issued, and was executed.

Error to the Circuit Court of Talladega. Before the Hon. Geo. W. Stone.

This was an action of trover, instituted by plaintiffs, against the defendants in error, to recover damages for the conversion of a wagon, four mules and a horse. By the bill of exceptions, it appears that in 1840, Sims, Nolen, and Wes-

son, recovered a judgment against Cogburn, one of the plaintiffs, and one Conner, upon which an execution issued in 1844, for the use of Elliott, and was, by direction of Elliott, levied by Spence, then sheriff of Talladega county, on the above named property. It further appears, that the said property, at the time of the levy, belonged to plaintiffs, and was in the possession of Cogburn, and that in 1842, Cogburn was declared a bankrupt, and received a certificate of discharge as such, which fact was made known both to Spence and Elliott, the defendants, when the levy was made.

The court charged the jury, in substance, that the facts above set forth, if they believed them all to be true, were not sufficient to maintain the action, to which the plaintiffs excepted, and now assign it as error.

L. E. Parsons, for plaintiffs in error.

1. The decisions are conflicting as to the effect of a discharge in bankruptcy. In New York, it is *prima facie* an extinguishment; and the judgment creditor must bring an action of debt, so that the bankrupt may plead his discharge. Baldwin v. Tillson, 1 Denio, 621. And this court has decided, that where an execution has issued, it may be superseded, and the discharge set up in that proceeding. Mabry et al. v. Herndon, 8 Ala. 864. It has also been said, in reference to this question, that "there are cases where there are several remedies." Comstock v. Grout, 17 Verm. 515; and it is insisted that such should be the decision of this court.

2. The rule contended for is this: that as to all judgments in existence at the time of the discharge, the plaintiff be required to give the bankrupt notice, in the nature of a *sci. fa.*, to show cause why he should not have execution generally, or specially, because of certain specified liens. As to suits brought after the discharge, the act provides, "it shall and may be pleaded," &c. This rule would protect the rights of both parties; for unless the discharge was obtained by fraud, or the debt is of a fiduciary character, or there be liens, the plaintiff has no right to an execution; and the bankrupt has the right to be protected against the issuance of void process. Is there not a distinction between a discharge by matter of record, and by matter *in pais?* The latter may be pleaded,

or not, as the debtor thinks proper; but the former, is already of record, and is notice to the world. The most plausible argument on the part of the defence is, that the sheriff must obey the mandate of the writ, because it is the mandate of the court. If the above view is correct, it is not the mandate of the court, and the sheriff therefore is not bound to execute it. Graham and Taylor v. Chandler, at this term; 5 Stew. & Por. 237; 7 Ala. 660; 11 ib. 431; 13 ib. 459.

3. But however the doctrine may be ruled on the foregoing point, the court clearly erred in charging, "this action could not be maintained against the defendant Elliott," who, as appears by the record, "ordered and procured the issuance of the levy and execution, and with actual notice of the discharge of Cogburn."

Rice & Morgan, contra.

1. The bankrupt is entitled to the intended benefit of the bankrupt law—relief from the debt, whether reduced to judgment or not. Comstock v. Grout, 17 Verm. Rep. 514; Mabry et al. v. Herndon, 8 Ala. Rep. 858.

2. The certificate in bankruptcy does not make the judgment or execution of a state court, void by judgment of court, but voidable merely, like a release of a debt. The district court of the United States, does not possess the power, by a mere decree in bankruptcy, to render void the judgments and executions of state courts against a bankrupt.

3. Where a bankrupt is imprisoned under *ca. sa.* from a state court, at the time he obtains his certificate, the certificate does not make the imprisonment void, but voidable merely, like release of a debt. 17 Verm. Rep., above cited; Aldrich v. Aldrich, 8 Metc. Rep. 102.

4. The certificate is not an absolute discharge, but only a discharge *sub modo.* It is not a discharge from fiduciary debts, nor from torts; although it is issued in general terms, it leaves it to the bankrupt to avail himself of it, so far as the law has made it an effective discharge. Wilmarth v. Burt, 7 Metc. Rep. 261; Matter of Tibbetts, 5 Law R. 259. Nor is it a discharge from the lien of a judgment or attachment acquired before the application for a discharge. 9 Sm. & Marsh. 9; 10 ib. 348.

5. Although the bankrupt may have his certificate in his pocket, and show it to the officer, in the amplest form of a full and complete discharge from all his debts, yet by operation of the very law under which it was granted, it may be no discharge of any debt. Fraud invalidates such a certificate. Mabry et al. v. Herndon, 8 Ala. Rep. 848; Wilmarth v. Burt, 7 Metc. Rep. 260.

6. The law has provided appropriate modes, by which the bankrupt may secure to himself, the intended benefit of his discharge. If he does not avail himself of such modes, he loses the benefit of the certificate—not because of any fault of the law, but because of his own fault, ignorance or negligence. Thus, if a suit is pending against a bankrupt, at the time he obtains his certificate, and he fails to plead it, and suffers judgment to be rendered against him, he is by such failure, precluded afterwards from availing himself of the benefit of that discharge, as against that demand. When the certificate is obtained, after judgment, still, it must be pleaded —that is, *audita querula* or *supersedeas* must be resorted to. 8 Ala. Rep. 857, 858.

7. If, before the certificate is obtained, a judgment is had against the bankrupt, and he has no opportunity to plead his discharge, then, under the English practice, he was entitled to the writ of *audita querula*—and as *supersedeas* is regarded in Alabama as the substitute for *audita querula*, the bankrupt in this state is entitled to the *supersedeas*—the object of which, is to restrain the proceedings upon a judgment, until some matter of discharge, arising after judgment, can be presented in some issuable form to the plaintiff in the judgment; and the effect of the *supersedeas*, if decided favorably to the defendant in the judgment, is to have his discharge from the judgment entered of record. Lockhart v. McElroy, 4 Ala. Rep. 572; Comstock v. Grout, 17 Verm. Rep. 514; McDougald and Reid v. Talbot, 5 Ala. Rep. 810; Lister v. Mundell, 1 Bosanquet & Puller's Rep. 428; 35 Law Lib., t. p. 325, marg. p. 428.

8. In every case, the certificate must be pleaded, or it must be tendered, so that an issue may be made on it, either before, or after judgment, (8 Ala. Rep. 857, 858,) so that the opposite party may join issue on its validity.

9. The officer arresting a bankrupt, has no power to discharge him. The court itself (issuing the process under which the arrest was made) will not discharge him, without giving the party arresting, time to show that the certificate was fraudulently obtained. A sheriff is bound to arrest a bankrupt, or levy, if the process is regular on its face, and issued from a court having jurisdiction of the subject. 35 Law Lib. t. p. 325; Sherwood v. Benson, 4 Taunt. 631; 7 Metc. R. 261, above cited; 8 ib. 106, above cited; 17 Verm. Rep. 514; 8 Ala. Rep. 858; Robb v. Powers, 7 Ala. Rep. 658; Stewart v. Ray, 4 Iredell's Rep. (Law) 269; Tarlton v. Fisher, Douglass's Rep. 650.

DARGAN, J.—When this cause was first submitted to the court, I was of opinion that the action could be maintained on the evidence contained in the record. Subsequent reflection however, aided by the argument of counsel, has satisfied me that the law is otherwise.

1. The bankrupt act does not intend, nor in any manner undertake to restrain a creditor, who has a cause of action against a bankrupt, from suing him, although the bankrupt may have obtained his final certificate of discharge. It only gives the bankrupt a complete defence against the cause of action when sued.

The language of the act, to be found in the fourth section, is, "And such discharge, and certificate, when duly granted, shall in all courts of justice, be deemed a full, and complete discharge of all debts, contracts, and other engagements of such bankrupt, which are provable under this act, and shall be, and may be pleaded, as a complete bar to all suits brought in any court of judicature whatever; and shall be conclusive evidence of itself, in favor of such bankrupt, unless impeached for fraud, &c."

That the whole scope of the act, was to furnish the bankrupt with a complete defence to suits brought against him, is still more apparent, from the fact, that the certificate is not a bar, if the debt is of a fiduciary character, or if the discharge be obtained by fraud.

The act therefore, only intends to arm the bankrupt with

a perfect defence, against all debts discharged by the certificate obtained, in pursuance of the act.

The creditor may however, sue on his demand, otherwise he could not dispute the *bona fides* of the certificate, and the bankrupt must rely on his certificate in bar of the suit.

2. But if the demand of the creditor was reduced to judgment, before the certificate was granted, the act does not compel him to bring an action of debt on the judgment, in order to test the question, whether the certificate of discharge is a bar to his demand, or not; and as he is not compelled to sue again on his judgment, he may proceed with his suit, as it stood before the certificate was granted, and issue his execution, at the risk however, of having to set it aside, or quashed, by an application to the court on the part of the bankrupt.

This seems to be the natural construction of the act, and accords with decisions made upon this subject.

In the case of Mabry, et al. v. Herndon, 8 Ala. Rep. 848; an execution issued against a bankrupt, who had obtained his certificate; he filed his petition for a *supersedeas*, and set up his certificate in bar of the execution, and prayed to have it quashed, and the levy made by virtue of the suit, set aside.

The plaintiff impeached the certificate for fraud, and filed specific allegations, of what the fraud consisted. This court held, that the plaintiffs might make up the proper issues, in bar of the motion to quash the writ, and thus try the validity of the certificate; indeed, all the decisions, both English and American, hold that the creditor, who has obtained a judgment before the certificate of discharge is obtained, may sue out execution afterwards, and the remedy the bankrupt has, is to move the court to set it aside.

3. There being then a judgment, to which there are proper parties, and upon which the plaintiff may proceed, until arrested by the act of the bankrupt, the execution issued thereon is not absolutely void, but voidable only; *that is*, it is a valid writ *until* the bankrupt shows it to be erroneous. Tarleton v. Fisher, Douglas's Rep. 646; 7 Metc. 247; 8 ib. 103; 2 W. Black. Rep. 1190; 1 Bos. & Pull. 426; 4 Taunton, 631.

4. The execution being voidable only, and not void, it af-

fords a full and ample protection to the officer, who merely obeys the mandate of the law in executing it. The books not only abound with decisions to this effect, but I have found no case that holds a contrary doctrine.

5. It is however urged, that though the writ may protect the sheriff, it cannot afford protection to Elliott, for whose use it was issued, and who directed the levy to be made. The correct rule on this subject, is, that if the writ is voidable only, and not void, it will afford to the officer executing it, full protection. It also affords protection to the party issuing it, until it is avoided.

6. When the defendant has caused it to be set aside, or annulled, as erroneous, then the party issuing the process, is responsible, for all the injury resulting to the defendant, from its execution. 4 Wharton, 339 ; 7 Metc. 257 ; 2 Douglas, 671.

7. It has, however, been urged, with much force, that this construction of the bankrupt act, will, or may frequently deprive the bankrupt of that full protection, intended to be secured to him; for if the writ is voidable only, and not void, and the sheriff should sell before it is set aside, the title of the purchaser would be complete, and thus the defendant divested of his property, when he has a full discharge from the debt. The answer must be, that the act designed to furnish the bankrupt with a full defence against all his debts, save those excepted by the act, and if before he has had an opportunity to make this defence, he has been injured by the act of the plaintiff, through the medium of the process of the court, the law will give him redress by way of damages, after he has shown to the court that the process is erroneous, and has obtained a judgment setting it aside.

Whether a purchaser, would obtain, however, a title to property sold under process that is voidable, after it has been set aside, or under what circumstances, if any, his title would be held defective, it is unnecessary to enquire.

The ruling of the circuit court was in conformity to the view here taken, and the judgment must be affirmed.

COLLIER, C. J.—I concur with my brother Dargan, that an action cannot be maintained against a plaintiff in execu-

tion at the suit of the defendant, though the execution was *voidable*, or perhaps in some cases *void*, for an injury resulting to the latter, by its enforcement, until the process has been avoided. Whether, and under what circumstances, the defendant can maintain an action in the case of *voidable* process, after it has been set aside, is a question which does not now arise in judgment, and I leave it to be considered when it shall be directly presented for decision.

YARBOROUGH v. THE JUDGE OF THE COUNTY COURT OF SHELBY.

1. A judgment, in a bastardy proceeding, will not be reversed, because the judgment entry omits to state in whose favor the judgment is rendered. The statute determines, with unerring certainty, who is the plaintiff.
2. Where a defendant in a bastardy proceeding is in custody, when a judgment is rendered against him, it is not erroneous, for the court to order, that he remain in custody, until he gives the bond required by the statute.

Error to the County Court of Shelby.

THIS was a proceeding under the bastardy act, instituted at the instance of one Lucy Farr, who made affidavit, that the plaintiff in error was the father of a bastard child, with which she was then *enciente*. The cause was submitted to a jury, on the plea of the general issue, and a verdict of guilty rendered. The judgment entered thereon is set out fully in the opinion of the court, and is the error now assigned by the plaintiff.

W. W. MORRIS, for plaintiff in error.
S. F. RICE, contra.

COLLIER, C. J.—It appears from the record, that the defendant below claimed a trial by jury, and that an issue was

submitted to try *whether he was the real father of the bastard child of which Lucy Farr was then pregnant.* To this issue the jury responded, that he was *guilty.* The court thereupon adjudged, *that the defendant be condemned to pay fifty dollars annually, for ten years, towards the maintenance and education of said child; and that he be in custody of the sheriff, until he find good and sufficient security for the faithful payment of the annual sums of fifty dollars; and that the defendant pay the costs, for which execution issue.*

The statute provides for the trial of an issue in the form of that set out in the judgment entry, if the defendant desires the question of filiation to be tried by a jury. If a verdict is returned against the defendant, he is to be condemned by the judgment of the court, to pay not exceeding $50, at its discretion, yearly, for ten years, towards the maintenance and education of the child: *Further*, the imputed father shall give bond and security for the due and faithful payment of the sums adjudged, which shall be made payable to the court, &c. This bond is to have the force and effect of a judgment, and execution may issue thereon upon each default.

It will be observed, that the judgment, so far as it affirms the verdict, ascertains the annual payment to be made by the defendant, and the object to which it is to be applied, conforms to the statute. In Trawick v. Davis, 4 Ala. Rep. 328, the judgment was in these respects almost *verbatim* the same, without designating *eo nomine* in whose favor it was rendered, or to whom the payments should be made. This court held the judgment to be regular, and said, "the bond consequent upon the judgment is required to be payable to the county court; and this in the absence of more explicit legislation on the point, may serve to show that the judgment should be considered to be in favor of the judge of that court, as the representative of the county." To the same effect is Austin v. Pickett, 9 Ala. Rep. 102. These citations very conclusively establish, that it is not indispensable that the judgment of condemnation should state in whose favor it is rendered—the law determines, with unerring certainty, who is the plaintiff, and this is quite sufficient.

We must infer from the record, that the defendant was present in court when the issue was tried; because he had previously entered into a recognizance, and the order states that "he is in custody of the sheriff," &c. The question then is, whether the order for his detention was the proper mode of securing obedience to the judgment. It is not indispensable to the regularity of the proceeding, that the defendant should appear, to authorize the court to determine the question of filiation. Trawick v. Davis, 4 Ala. R. 328. Where a judgment is rendered against him in his absence, there can be no doubt that he may be attached, if he fails to execute the bond, which the statute requires. But if he is present, there can be no necessity for issuing an attachment to answer for the contempt; an order to detain him in custody, would be altogether as regular as the most formal writ directing his arrest. Certainly the court could not permit a party to escape from its presence, and thus defeat a compliance with a peremptory order, which contemplated prompt obedience, for the want of power to restrain him. If, in such case, it was powerless, its judgment in cases like the present, would often be inefficient and valueless. We are satisfied, that the order directing the defendant to remain in custody, until he gave bond with surety, is unobjectionable. State v. Ingram, 4 Hayw. Rep. 222; Woodcock v. Walker, 14 Mass. Rep. 387. See also 4 N. Hamp. Rep. 369; 2 Greenl. Rep. 165. The judgment of the county court is consequently affirmed.

GERON v. GERON.

1. If a slave is pledged for the payment of a debt, the pawnee is accountable for the profits of the labor of such slave, in the absence of any agreement to the contrary.
2. If, in case of a pawn or pledge of a slave, the hire discharges the debt for which it was pledged, the pawnor is entitled to have it restored to his pos-

session, and may recover it by action at law, or defend his right to the possession, if sued by the pawnee.

Error to the Circuit Court of Madison. Before the Hon. Sidney C. Posey.

This was an action of detinue, instituted by defendant, against the plaintiff in error, to recover possession of a female slave. By the bill of exceptions, it appears that, in 1836, one Lewis M. Sumpter, who married the daughter of Solomon Geron, to which daughter the said Geron had, before her marriage with Sumpter, given the slave in controversy, allowed the defendant in error to remove said slave from Tennessee to the state of Alabama, where he kept possession of her, and hired her out from year to year, until 1846, for $75 a year. The defendant in error offered proof conducing to show a purchase by him of said slave from Sumpter and wife, but the evidence was conflicting as to whether it was a sale, or a pledge, or either. The plaintiff in error, at the time of the suit, was in possession of the slave, as the agent of Sumpter. This statement of facts, with those set out in the opinion of the court, are sufficient for a full understanding of the only question raised by the assignment of error. The court charged the jury, that if, at the time of the contract for such pledge, or pawn between Sumpter, and the defendant in error, no time was specified for the redemption of the slave, and no settlement had taken place between them, then the plaintiff in error was not authorized to take said negro into his possession, and the defendant in error would be entitled to recover. The plaintiff in error excepted to this charge, and it is now assigned as error.

S. Parsons, for plaintiff in error.

The money for which the negro was pledged, was discharged by the hire, and much more than discharged; because the loan, having been made in Tennessee, did not bear interest, so far as the proof showed.

In detinue for a slave, by the pawnee against the pawnor, a tender of the money may be given in evidence, without

being pleaded. Macon v. Owens, 1 Brevard's R. 69, and authorities there cited.

Of course the owner, or his agent, may take the property after the pledge is discharged. And as the defendant took as the agent of the owner, he could give in evidence any thing that the owner might have proved, if he had been sued. Dunklin v. Watkins, 5 Ala. 199.

Detinue does not lie, because the owner took his property by force. Carroll v. Pathkiller, 3 Porter, 279.

C. C. Clay, Jr., contra.

The plaintiff proved a legaltitle in himself; and in this action the *legal* title alone is in controversy. If there be an equitable title in another, he must seek relief in a court of equity. Hundley v. Buckner, 6 Smedes & Marsh. 70.

The testimony of defendant did not show that the hire was to go in satisfaction of the money paid for the slave by the plaintiff, and hence the court was not wrong in refusing to charge as asked. Defour v. Bourne, 4 Bibb, 345.

To enable the court to have instructed the jury as asked, the proof should have been clear and convincing, that a mortgage was intended. Freeman, adm'r, v. Baldwin, 13 Ala. Rep. 246.

The proof of an absolute bill of sale, together with the plaintiff's admission, if he was understood and correctly reported by the witnesses, showed a conditional sale; that Sumpter might redeem her on refunding the $450 advanced for her. He said, "don'take her until I have seen Sumpter and arranged the $450 with him," which negatives the idea that he was to account for hire, or that the money paid for the slave was to be extinguished in that way. He evidently did not use the word pawn, or pledge, in its technical sense, as the bill of sale, and his allusion to the $450, show. There was no proof that the $450 had been paid or tendered him. The proof was altogether too vague and indefinite to warrant the charge asked.

CHILTON, J.—The proof, in the court below, was conflicting, whether the defendant in error was the absolute owner of the slave in suit, or held her in pledge for the pay-

ment of $450, which he had previously advanced to Solomon Geron to redeem her from a person to whom Solomon had sold said slave. We are informed by the bill of exceptions, that shortly before the institution of the suit by Jehu Geron against the plaintiff in error for the slave, the latter called upon said Jehu, and presented two orders from one Lewis M. Sumpter, one authorizing him to demand and receive said slave from Jehu Geron, the other demanding payment of the hire to be made to the said Simeon, agreeably to an arrangement made between Sumpter and Jehu. What the agreement alluded to was, neither the order nor the proof informs us. It however appears that upon a presentation of the ordres to Jehu Geron, he did not then dispute or deny the right or title of said Sumpter to said negro, but spoke of the pawn or pledge to him of said slave by Sumpter, and requested Simeon Geron not to take said slave away, until he had seen Sumpter and arranged the $450 with him. The proof showing that Jehu Geron had held the slave from 1836 until a short time before the commencement of the suit, and that her hire was worth $75 per year, it was insisted that the hire of the slave would have fully paid the debt, especially as the money was advanced in the state of Tennessee, and the rate of interest in that state was not shown. The bill of exceptions does not purport to set out all the proof, and we are not allowed to indulge in presumptions adverse to the regularity of the judgment. Assuming that the plaintiff below was a pawnee, the circuit judge charged the jury, "that if at the time of the contract for such pledge or pawn between said Sumpter and said Jehu, no time was specified for the redemption of the same, and no settlement had taken place between them, then the defendant was not authorized to take said slave into his possession, and the plaintiff would be entitled to recover."

It appears from the proof that Simeon Geron held the slave for Sumpter, as whose agent he had demanded her of the plaintiff below, and consequently had the right to protect his possession by setting up the claim of his principal. Dunklin v. Wilkins et al. 5 Ala. Rep. 199. The charge of the court assumes, that if no time was fixed for the redemption of the slaves, by the contract between the parties, and no settle-

ment had been made between them, the plaintiff was entitled to recover. This charge, under the facts proved, was manifestly erroneous, as it in effect, withdrew from the jury the question, whether the hire of the slave was not adequate to the complete payment of the debt and interest, for which she was put in pledge. The rule seems to be too firmly settled now, to be doubted, that where a slave is pledged for the payment of a debt, the profits of the labor of such slave is to be accounted for by the pawnee, in the absence of an agreement providing the contrary. Story on Bail. 232, § 443. And such profits, says Mr. Chancellor Kent, should be deducted from the debt. 2 Kent's Com. 578-9, 3d ed. If the debt is discharged, for the payment of which the lien has attached, the property is discharged of the incumbrance, and the pawnor having it in possession, most certainly has the right to retain it; but if on the other hand, any portion of the debt remains unpaid, and no tender of it has been made to the creditor, he has the right to a judgment restoring to him the pledge. We of course intimate no opinion upon the facts of the case, as to whether Jehu Geron held the slave absolutely, or as a pledge. This is a fact to be ascertained by the jury; if they find she was pledged, and there was no contract that the hire should be set off against the interest of the debt, then they should determine whether the debt, with the accruing interest, has been discharged by the hire. If there was a contract thus to set it off, and it did not amount to a device to avoid the usury laws, then the plaintiff below is entitled to his principal debt, without respect to the hiring. See Harrison v. Hicks, 1 Por. Rep. 423; Hamer v. Harrell, 2 St. & Por. 323. We think there is no necessity in such case as this, for turning the parties round to a court of equity, as is insisted by the counsel for the defendant in error, in order that the defendant may redeem; for we repeat, if he has paid the debt, or if the hire has extinguished it, and the party, by his agent, has the property in possession, his legal title is complete, notwithstanding the plaintiff may have a bill of sale. Judgment reversed and remanded.

GRAHAM, ET ALS. V. KING.

1. Where C. executes a deed of trust to indemnify K. against loss, as his security on a note, with power of sale, whenever a judgment on the note is rendered against K., and K. before the maturity of the note purchases, or pays it, a court of equity will enforce the deed for the benfit of K., to the extent of his disbursement in the purchase or payment of the note.
2. Where two successive deeds of trust are executed for the same property, to the same trustee, but for the benefit of different *cestui que trusts*, and the trustee sells it under the *junior* lien, the purchaser acquires by his purchase the equity of redemption of the grantor in the property, and it is error in the chancellor, on a bill filed to enforce the prior lien to decree the title of the purchaser null and void.
3. Where on a bill, filed for a foreclosure, it is referred to the master to take and state an account, it is error in the chancellor, to make a final order for the sale of the property before the report of the master comes in and is confirmed.

Error to the Chancery Court of the 20th District. Before the Hon. David G. Ligon, Chancellor.

THE bill in this case was filed by defendant against plaintiffs in error, to enforce the provision made for his benefit in a deed of trust executed by one Cathey, deceased, to Graham, as trustee, who also is administrator on said Cathey's estate. The facts appear in the opinion of the court. The chancellor decreed in favor of complainant, which is now assigned as error.

GRAHAM, for plaintiffs.
ERWIN, for defendant.

DARGAN, J.—On the 22nd of January, 1841, Francis L. Cathey, executed a deed to Alexander Graham, of a section of land, to secure the complainant against loss, on account of his liability as the security of the grantor, on two notes; one for eight hundred and fifty dollars, due the first of January, 1842, the other for eightteen hundred and fifty dollars, due January, 1843.

The trustee was authorized to sell the land, for the purpose of paying those debts, whenever judgment was obtained against the complainant, for the whole, or any part of said debts.

Soon after the execution of this deed, Cathey executed another, conveying the same land, with other property to the same trustee; for the purpose of securing other debts.—But in this second deed, the priority of the first is recognized, and the second is made subject to it. Cathey shortly after died, and his estate is declared insolvent: after his death, the trustee, Graham, sold the land under the *second* deed, and Lea and Townes became the purchasers. The complainant, purchased for $1500, the note of eighteen hundred and fifty dollars, before it became due, and judgment has been recovered against him, for a small balance due on the note of eight hundred and fifty dollars. The object of the bill, was to charge the land with the payment of the note of eighteen hundred and fifty dollars, and also, the amount due on the note of eight hundred and fifty dollars. The chancellor granted the relief sought by the bill, and by his decree, established the right of complainant, and declared the deed executed to Lea and Townes, null and void. He also directed the register, to take an account of the actual amount paid by the complainant, as security of Cathey, as well as the amount still unpaid, on the note of eight hundred and fifty dollars. A final order of sale was also rendered, and the register ordered to pay over to the complainant, the amount that he should ascertain to be due to him. From this decree, a writ of error was taken to this court. The plaintiff in error contended, that the complainant, by paying off the note of eighteen hundred and fifty dollars, before it fell due, and before judgment could be rendered against him, discharged the lien created by the deed of trust, in his favor, to secure the payment of it.

The object of the deed, was to protect the complainant, against his liability as the security of the grantor. The lien on the land, created for this purpose, is *eo nomine* dependent on the power to sell; and although the contingency on the happening of which, the trustee was authorized to sell, will never take

place, yet the deed creates a trust, in favor of the complainant, that a court of equity must enforce for his indemnity.

That the complainant paid this note before its maturity, can in no manner impair his right under the deed; for the very object of the deed, was to protect, and indemnify him from loss against the payment of these debts. To permit the grantor, or those claiming under him, to hold the land discharged from the trust, because the complainant paid the debt before it was due, would be repugnant to every principle of justice and equity. There is, therefore, no error in this portion of the decree, establishing the title of the complainant, and declaring it superior to the title of defendants.

The chancellor, also, in our opinion, laid down the correct rule by which the register was directed to ascertain the amount due to the complainant. The object of the deed was to afford indemnity to the complainant, and nothing more, and having bought, or paid up the debt of eighteen hundred and fifty dollars, before maturity, for less than the actual amount, he cannot claim of his principal, more than he actually paid, with interest.

In decreeing the right of the complainant, to be superior to the title of the defendants, and also in laying down the rules by which the register was to ascertain the extent of that right, or the amount of money due to him, there is no error in the decree. But the chancellor erred in declaring the title of Lea and Townes, to be null and void—By their purchase under the second deed, they acquired the equity of redemption in the premises, and have the right to pay up the amount that may be ascertained to be due to the complainant, and if they do this, they will hold the land discharged of the trust, or if the land be sold, and it brings more than enough to pay the complainant, the amount due to him, and all cost, they will be entitled to the surplus, by virtue of the deed. Their title should, therefore, have been declared subordinate to the right of the complainant, but not null and void.

The final order of sale was also prematurely made. After the equity of a complainant's bill is settled by the decree, if it is necessary to order a reference to the register, to ascertain the extent of that equity, or the amount due to him, the final or-

der of sale should not be made, until the coming in, and confirmation of his report.

It is true that the chancellor may himself ascertain the amount due to the complainant by his decree, if the evidence in the cause enables him to make the correct computation. If he assumes this duty, and does not err in his computation, the decree cannot be reversed. (The Bank v. Strother, decided at this term.) But the usual, and better practice, is, to order a reference to the register to ascertain, and report the amount due the complainant; when this is done, unless for some special reason, no order of sale should be made, until the report of the register is made, and confirmed by the chancellor. Then the final order of sale should be made, and the register ordered to pay the amount thus ascertained to be due, to the complainant. For these irregularities, in the form of the decree, it must be reversed—that further proceedings may be had, in conformity with this opinion.

SCOTT AND SCOTT v. JOHN.

1. If a person, not a party to the record, causes an execution to be issued, in the name of a dead plaintiff, and levied on property, to which a claim is interposed, he cannot be compelled, by process of attachment, to pay the costs of the claim suit, it not appearing, that he was a gratuitous volunteer, or that he was aware, at the time, of the plaintiff's death. In such a case, the liability of the party must be fixed by suit in the ordinary mode.
2. Whether, if one person uses the name of another, without his knowledge or consent, in a suit, in the subject matter of which, he has not, and never had any interest, such person would not be liable to attachment, as for a contempt—*quere.*

Error to the Circuit Court of Perry. Before the Hon. John D. Phelan.

This case originated in a notice by defendant, to plaintiffs

in error, to show cause why they should not be required to pay the costs, that had accrued in a claim case, wherein one James Scott was plaintiff in execution, Robert H. Porter and David Harding, defendants, and defendant in error, claimant. It appears, that at the time of the issuance and levy of the execution, the said James Scott, the plaintiff therein, was dead, and that it was issued and levied, by the direction of the plaintiffs in error, on the property, which was claimed by the defendant in error. The case progressed for some eighteen months or two years, when the levy was discharged, and the claim suit dismissed. The court adjudged, at its spring term, 1848, that the plaintiffs in error pay the costs of the next term of the court, or in default therein, that they then appear, and show cause why an attachment should not issue against them. At the fall term, 1848, the plaintiffs in error, after due notice, having failed to pay said costs, and showing no cause why an attachment should not issue, it was ordered that an attachment issue against them, and, when arrested, that they be held in custody until the costs are paid.

The judgment of the court is now assigned as error.

A. B. Moore, for plaintiffs in error.

1. All the authorities cited by plaintiff from New York, were motions predicated on statutes of that state. 2 Cowen, 460; 2 Rev. Stat. N. Y. 619, § 44; 621, § 8.

2. If the court quashed the rule upon the ground that the issuance of the *fi. fa.* at the instance of defendants was a contempt of court, it was erroneous, as the statute limits and prescribes the cases in which the courts may punish for contempt, and does not embrace a case of this kind. Digest, 150.

3. The motion for an attachment should have been predicated on affidavits, setting forth the grounds of the motion. See Gates v. McDonald, 3 Porter, 360; 1 Tidd, 479; 1 Bacon, 472; 9 Johnson, 394; 6 ib. 338.

4. The granting the rule for an attachment in this case, was directly in the face of our statute in regard to imprisonment for debt. See Clay's Dig. 70, § 1, 2.

Garrott, contra.

1. The suit in which the costs contended for originated,

was a proceeding to try the right of property, and is subject to the same rules as other suits. Jacott v. Hobson, 11 Ala. R. 434.

2. But defendant in error relies not so much on any statute, as upon the general and innate powers of all courts to protect its suitors, and to compel all persons coming under their jurisdiction to do justice. The defendants in error were the parties in interest in the above suit, and after they prosecuted this suit in the name of another until a large bill of costs had accumulated, it is unjust in them to refuse to pay them to the defendant in error. That the law will not permit them to do this, and that defendant in error adopted the proper remedy for redress, is believed to be shown by the following authorities: Webb v. Ward, 7 T. R. 296; 6 Vin. Abr. 323, tit. Costs; 2 Bacon's Abr. 548, tit. Costs; Tyler v. Person, 1 Murph. N. C. R. 498; Ashe, adm'r, v. Smith, 2 Haywood's N. C. R. 305; Norton v. Rich, 20 J. R. 475; Waring v. Bank, 2 Cowen, 460; Schoolcraft v. Lathrop, 5 ib. 17; Jackson v. Van Antwerp, 1 Wend. 295; Colvard v. Oliver and Stiles, 7 Wend. 497; Jordan v. Sherwood and wife, 10 Wend. 622; Brazier v. Tarver, 4 Ala. R. 569.

3. If this proceeding cannot be sustained, it is submitted, that the defendant in error has no remedy. Assumpsit clearly would not lie, and it is also believed that case could not be maintained; because every citizen has the privilege of prosecuting suits for his rights, (provided perhaps he does not do it maliciously,) and if he should be liable to an action for suing for these rights, he would in effect be deprived of this privilege.

COLLIER, C. J.—It has been held, by repeated decisions in New York, that persons who have a beneficial interest in the subject of the litigation, and sue or defend in the names of others, may be adjudged to pay the costs, and compelled to do so by attachment. See Norton v. Rich, 20 Johns. R. 475; Waring v. Barrett, 2 Cow. Rep. 460; Schoolcraft v. Lathrop, 5 Cow. Rep. 17; Jackson v. Van Antwerp, 1 Wend. Rep. 295; Colvard v. Oliver, 7 Wend. Rep. 497; Jordan v. Sherwood, 10 Wend. Rep. 622. But in that state, there is a statute which declares that any "person beneficially inter-

ested in the recovery" in an action which he may bring, or cause to be brought, shall be liable for costs. Under the influence of this enactment, it has been decided, that a person bringing an action in the name of another, is liable for the costs recovered by the defendant against the nominal plaintiff, though his interest in the demand prosecuted, is only by way of mortgage or lien. Whitney v. Cooper, 1 Hill's Rep. 629. And the statute is applicable, though the party thus suing in the name of another was interested only in a part of the demand. Bliss v. Otis, 1 Denio's Rep. 656. But where one person, for the protection of his own interest, defends an action in the name of another, he will not be chargeable with the costs which the plaintiff recovers. Miller v. Adsil, 18 Wend. Rep. 672. Accordingly, where a landlord defended an ejectment in the name of his tenant, it was held that he would not be ordered to pay the costs recovered by the plaintiff. Ryers et al. v. Hedges, 1 Hill's Rep. 646; Livingston v. Clements, ib. 648.

In Butterworth v. Stagg, 2 Johns. Cas. 291, W. brought assumpsit on a promissory note in the name of B., who was neither the payee or holder of the note, or in any manner interested therein; W. had no authority for thus suing, and B. knew nothing of the suit. The court said, "this is evidently an abuse of the process of the court. It is a contempt to bring a *fictitious* suit, or to use the name of another, without his privity or consent. If we do not interfere, the nominal plaintiff may be materially injured; and when it is in our power to afford him relief in this summary mode, as for a contempt, we ought to do it, and reach the real person who has perverted the process of the court." A rule was accordingly granted, to show cause why an attachment should not issue against W. In a similar case in North Carolina, the party who thus abused the process of the court, by suing in the name of another, was ordered to pay the costs, and execution was directed to issue for their collection. Ashe v. Smith, 2 Hayw. Rep. 305. This latter decision is not supported by either argument or authority, and is so reported as to entitle it to little weight.

It is needless to notice the citations made by the plaintiff

in the motion, from the British reports, as they relate to requiring security for costs; and besides, the leading case of Webb v. Ward, 7 Term Rep. 296, it is said has been much questioned. See Snow v. Townsend, 6 Taunt. Rep. 123. Tyler v. Person's adm'r, 1 Murp. Rep. 498, belongs to the same category.

By a statute of this state, passed in 1824, it is enacted that "on all suits instituted in any court of record in this state, in the name of one or more persons, for the use of another, and judgment thereon rendered against the plaintiff or plaintiffs for costs, it shall be lawful to enter up judgment, and issue execution against the person or persons for whose use such suit or suits may be instituted." Clay's Dig. 316, § 22. This provision has been always held to apply where the name of the beneficial plaintiff is set out in the record; and indeed, we do not see how the terms employed, could be so extended by construction, as to embrace one whose name was not disclosed upon the record, but who merely used the name of another, in whom the legal right to sue was vested. It would be an extension of the doctrine of equitable construction beyond all precedent, and when, too, the contemporaneous and continuous practical exposition, has given to the language used, its natural and obvious meaning.

We are constrained to think, that the cases first cited from New York, were influenced either by the statute which it seems exists there, or by some rule of practice peculiar to that state. This conclusion is induced by the refusal in the citations from 1 Hill and 1 Denio, to direct a stranger to the record to pay the costs in a case not coming within the statute, and from the additional consideration, that after the most diligent search, we have not been able to find a similar decision in any other state.

The case in 2 Johns. Cases, we think lays down the true rule. There, a person who had not, nor ever had any interest in the note, was made the nominal plaintiff, without his knowledge. This was a palpable abuse of the process of the court, and it was necessary to the vindication of the authority and dignity of the law, as well as the protection of the plaintiff, that an attachment should issue as for a contempt. But if there had been nothing of which a contempt

could be predicated, we imagine the summary and extraordinary power of the court could not have been successfully invoked.

In the case at bar, it does not appear that the plaintiffs in error were mere gratuitous volunteers, in causing the execution to issue in the name of the plaintiff in the judgment. It must, in the present posture of this case, be intended, that they were interested in enforcing payment of the judgment. Nor is it alleged, or proved, that the plaintiffs were aware of the death of the plaintiff in execution at the time the slave was levied on, or even up to the determination of the cause involving the right of property. There is, then, no predicate upon which to rest the wrongful interference of the plaintiffs in error, in causing to be sued out and levied, the execution in the name of the dead plaintiff, or in the prosecution of the consequential suit. If the plaintiff had been living, the execution would have been regular, and the agency of the defendants in the motion could have furnished no pretence for charging them as for a contempt. The ignorance of the plaintiff's death is a circumstance quite as potent to repel the inference of an abuse of process.

The present proceeding cannot be sustained upon any other hypothesis, than that a contempt of court has been committed. This, we have seen, cannot be deduced from the allegation upon which the jugment of the circuit court was sought. If the plaintiffs in error are chargeable with the costs adjudged to the defendant, their liability must be fixed by an action in usual form. Griffin v. Smith, 14 Ala. 571.

The judgment must be reversed.

FOSTER ET AL. V. MITCHELL ET AL.

1. A voluntary deed of gift of slaves, to one, in trust for the children of the donor, not acknowledged, or proved in open court, but before a justice of

the peace, and recorded, is void under the statute of frauds, against a *bona fide* purchaser from the donor.

2. Although a deed may be insufficient to vest title in the donee, under the statute of frauds, because not acknowledged or proved in open court, it may still operate as a declaration of the donor, evidencing a gift, provided the deed was consummated by a delivery in fact; and the fact, that the donees are infants, residing with their father, does not dispense with proof of a delivery.

3. A father made a deed, conveying three slaves, in trust to a third person, for his children, and afterwards sold two of the slaves. The children filed a bill against the purchaser, and made the father a party defendant, as to whom the bill was taken *pro confesso.* Held, that although the bill was dismissed against the purchaser, the deed not having been acknowledged, in open court, it should have been retained against the father, and a trustee appointed for the remaining slave, still in the father's possession.

Error to the 23d Chancery District. Tried before the Hon. W. W. Mason, Chancellor.

THE facts of this case appear in the opinion of the court.

ORMOND, for plaintiffs in error, made the following points:

1. The object of the second section of the statute of frauds, requiring voluntary conveyances to be proved in open court, and recorded, when possession did not accompany the deed, was manifestly *notice* merely. The *mode* of proving the deed prior to its registration, was a secondary consideration. It did not establish the *bona fides* of the deed, and was merely intended as *prima facie* evidence of its execution, preparatory to its being recorded. This portion of the statute of frauds, has been repealed by the act of 1836. Clay's Dig. 157, § 39. The language employed in that act is general, and the object to be attained by it, to simplify, and make more easy, the probate of deeds, in order to their registration, applies with as much force to deeds of this description, as to any other.

2. But if I am wrong in this view, the case of Sewall v. Gliddon, 1 Ala. 52, is an authority full to the point, that the deed, though not recorded as the law requires, is still a declaration of the donor evidencing the gift, and the court should not have dismissed the bill, because the probate of the deed was insufficient. Notwithstanding this, it was a valid gift,

if *bona fide.* The donees, being infants of tender years, and as such, residing with their father, his possessession was theirs, and the statute of frauds has nothing to do with the question. Sewall v. Gliddon, *supra.* The only question was, whether there was fraud in fact. This question was not passed on by the chancellor, and could not have been, as the case was not in a condition to be heard on the facts. The defendants moved to dismiss the bill for this cause, and the chancellor improperly responding in their favor upon this motion, rendered all other questions immaterial. The bill, it is admitted, is defective, but will be open to amendment, so as to try the case upon its merits.

E. W. Peck, for defendant in error, Albert P. Bush.

1. The counsel is mistaken: this case was submitted for final decree on bill, answers, exhibits and proof, or rather the agreement of parties as to facts.

2. Bush is a *bona fide* purchaser for valuable consideration, and as the deed is voluntary merely, it is as to him void, because it was not acknowledged, or proved and recorded, as required by the statute of frauds. McRae v. Pegues, 4 Ala. 158, 165; Myers v. Peek, 2 ib. 648; 8 ib. 345.

3. It cannot be sustained under the case of Sewall v. Gliddon, 1 Ala. 52, on the idea that it may be regarded as a parol declaration of the donor's wishes, because it cannot be good as a gift *inter vivos*, for want of possession in donee.

4. The common registry acts do not apply to a deed of this description. See the acts.

CHILTON, J.—The complainants, who are the children of James Mitchell, filed their bill in the chancery court of Pickens county, against the defendants, and aver, that the said James, on the 9th April, 1840, executed to one Benjamin B. Beall, a deed conveying certain negro slaves in the bill mentioned, to him, in trust for the complainants' benefit—said property to remain with the grantor, until the complainants should attain the age of twenty-one, at which time the said property was to vest in them, to their own use *in fee.* This conveyance was upon consideration of the natural love and affection of the father for them. The bill charges, that

the trustee refused to act. That the father, James Mitchell, had sold a portion of the slaves to certain of the defendants, and that he retained only one of them. That the complainants have reason to fear that the slaves will be fraudulently removed, &c. They pray that the trustee may be removed, and another appointed, who may take, and hold the slaves, subject to the trust. That the sales of the slaves by James Mitchell be declared void, and the parties restrained from removing the slaves, and required to have them forthcoming to abide the final decree.

The cause having been submitted upon bill, answers, exhibits and proof, for final decree, the chancellor dismissed the bill for want of equity.

1. The first question presented is, did any property in the slaves pass by the deed, which was acknowledged before a justice of the peace? By our statute of frauds, a voluntary deed of goods and chattels is void as to creditors and purchasers, except where the possession *bona fide* remains with the donee, unless the same be acknowledged, or proved by one or more witnesses in the circuit court, or county court of the county wherein one of the parties lives, within twelve months after the execution thereof. It is very correctly said, by the counsel for the plaintiffs in error, that the design of the statute in requiring such deeds to be proved in open court, and recorded, was to give notice to the world of their existence, in cases where the retention of the possession by the donor might otherwise give him a fictitious credit, or enable him to impose upon purchasers from him. And we cannot resist the conclusion, that the legislature, in discriminating between these and other conveyances, in respect to the mode of their acknowledgment or proof of execution, designed their proof or acknowledgment in open court, as a circumstance tending to give them greater authority, so as to prevent, as far as possible, fraud and imposition by the party in possession. Viewed in this light, the statute was dictated by wisdom and sound public policy. This distinction, we think, has never been lost sight of by the legislature. True, the act of 1836, (Digest, 157, § 39,) authorizing one justice of the peace to take and certify the acknowledgment and probate of deeds, is general in its terms; but we feel fully war-

ranted in saying, that this enactment was not designed to repeal any portion of the statute of frauds. The language employed in the statute of 1836, is persuasive to show a different intention; for the justice is required to take such acknowledgments, &c., in like manner as the judges of the circuit and county courts, clerks, &c. Now, none of the officers referred to had any power to take the acknowledgment of voluntary deeds, when the act was passed, and no such authority has been since conferred. We must then regard the deed as never having been recorded, and void as to purchasers by the statute of frauds.

2. But it is insisted, that although the deed cannot operate as such, for want of registration, it is nevertheless a declaration of the donor, evidencing the gift, which gift, if not fraudulent in fact, would vest the property in the donees. This may be conceded as a correct legal proposition; but before the plaintiffs in error can derive any benefit from it, it must be shown such gift was consummated by delivery; for the deed being invalid, to pass the property as against the purchasers, without delivery of the property, the gift is incomplete. Philips v. McGrew, 13 Ala. Rep. 255.

That the donees were infants residing with the father, does not dispense with actual delivery, either to them or to some one for them, so as to render the parol gift effectual. Sewall v. Glidden, 1 Ala. Rep. 52. Neither the bill nor the proof in this cause, shows that the donor ever parted with his dominion over the property, and this essential element to constitute a valid parol gift, being wanting, the deed as to the purchasers, is valueless, as evidence.

3. But the deed, though absolutely void as to the purchasers, is nevertheless valid as between the parties; and as a delivery of the deed is sufficient to vest the title without the actual delivery of the property, (Newman v. James & Newman, 13 Ala. Rep. 29,) and as Mitchell admits, by his default, that he has one of the slaves in his possession, undisposed of, which he is about fraudulently removing beyond the jurisdiction of the court, may not the complainants have relief against him? Although the donor is permitted by the deed, to retain possession of the property until the donees shall have attained the age of twenty-one years, yet it is made impera-

tive upon the trustee, by the terms of the deed, to see that he does not part with the possession of the property. We think the authorities sustain the position, that although a court of equity will not interfere at the instance of a volunteer, in cases of imperfect gifts *inter vivos* or voluntary assignments, voluntary executory trusts, or imperfect conveyances, yet in cases where the gift is perfected, and the donor retains the dominion, as trustee, over the property, the court will restrain him from defeating the title of the *cestui que trusts;* 2 Story's Eq. Jurisp., 4 ed., § 793, a, page 123, n. 1; and from fraudulently removing the property beyond their reach, especially when he has defeated the gift, as to nearly all the property, by a sale of it to third persons. The chancellor should have dismissed the bill as against the purchasers, but retained it as against James Mitchell, requiring him to find security that he would not remove the property beyond the jurisdiction of the court, and on his failure to do so, that the slave in his possession be placed in the possession of a trustee, to be appointed by the court, and hired out, and the proceeds of the hire paid annually to the said James Mitchell, until the property shall vest in possession in the donees by the terms of the deed.

Let the decree be reversed and remanded, and let the said James Mitchell pay the cost of this court.

LITTLE ET AL. V. KNOX, ADM'R.

1. If administrators execute a joint bond, they are liable for the acts of each other, and both are bound to protect the joint securities from the consequences of the acts of either.
2. An execution, issued on a judgment of the orphans' court, against an administrator, which is not made returnable to a regular term of the county court, is void, and a return of "no property" on such an execution, will not authorize the issuance of an execution on the administration bond against said administrator and his securities.

Error to the County Court of Sumter. Before the Hon. Preston G. Nash.

It appears by a bill of exceptions in this case, that the plaintiffs in error sued out a *supersedeas* against the defendant, in which they allege, that on the 27th day of April, 1840, Eleanor Knox and Hiram Steele were appointed administratrix and administrator on the estate of John C. Knox, dec'd, and gave bond with said plaintiffs as their securities, conditioned as the law requires: that the said Eleanor and Hiram thereupon undertook the administration of said estate, and returned an inventory, appraisement, &c.: that said Eleanor intermarried with one Heard, and that after said marriage the said Hiram, Eleanor and Heard acted as administrators: that in September, 1847, a final settlement was had of said estate, in the orphans' court of Sumter, when a judgment for $3322 45 was rendered against said Steele alone, in favor of the defendant in error, who was administrator of one of the deceased distributees of said estate: that execution issued on said judgment on the 8th October, 1847, and was returned by the sheriff on the .. day of November, 1847, "no property:" and that on the .. day of November, 1847, an execution issued on the said administration bond, against Steele and plaintiffs in error, as the securities therein. At the June term, 1848 of said county court, the plaintiffs in error moved to quash the last mentioned execution, which the court refused to do, and gave judgment thereon against the said plaintiffs and their securities on their *supersedeas* bond. This action of the court is now assigned as error.

Metcalfe, for plaintiff in error.

The execution which issued on the decree against Steele, was returnable not to a regular term of the county court, and was therefore void. A return of no property on a void execution, or an execution upon which property could not be taken, is insufficient to fix the liability of the sureties on the administration bond. Graham v. Chandler, 12 Ala. R. 829; Westmoreland v. Hale, 11 ib. 122.

To authorize an execution to issue against the sureties on an administration bond, there must be a decree against the

principals in the bond. Clay's Dig. 305, sec. 45; Watkins v. Basset, 3 Ala. Rep. 707.

Where a decree against an administrator is unauthorized, and after a return of no property to an execution issued thereon, execution issues against the sureties on the administration bond, the proper remedy is by *supersedeas*. 3 Ala. R. 707. The decree was improperly rendered against Steele alone, and a statute judgment consequent upon a return of "no property" void. 3 Ala. Rep. 707.

Hoit, contra.

The securities, upon an administration bond, are securities *for* the *estate*, and become liable whenever the administrators, or either of them, are guilty of a breach of duty, or fail to account for the assets received, and to the amount of the defalcation. But each administrator is only liable *as administrator*, for the assets which come to his hands. Lomax on Ex. 182, § 22; 2 Wms. on Ex. 1218, 1219, 1118; Bacon's Ab. "Executors, &c." D. § 2; Littlehales v. Gascoyne, 3 Brown's Ch. Rep. 74; Williams v. Holden, 4 Wend. Rep. 229; Moore v. Tandy, 3 Bibb's Rep. 97; Douglass v. Satterlee, 11 Johns. Rep. 16; Call v. Ewing, 1 Blackford'sRep. 301; Stewart v. Conner, 9 Ala. Rep. 803, 814-15; King v. Shackelford, 13 ib. 435: and each co-administrator has a right to settle a separate account of his administration. Case of Patterson's estate, 1 Watts & Serg. Rep. 291; 1 Sup. to U. S. Dig. at page 835, § 1031. Consequently the securities are liable for *each* administrator, to the amount he individually received.

This court has often recognized this principle, that it will not reverse a judgment, in such a case, on grounds not presented to the consideration of the court below. 5 Ala. Rep. 197; 9 ib. 71; 11 ib. 733, 740; 13 ib. 196.

If the court shall be of opinion, from the circumstances, that this case has been managed for delay, I respectfully submit, whether it is not a proper case in which damages ought to be allowed.

DARGAN, J.—It is contended, that the decree against Steele, alone, on which execution was issued, and returned,

no property, does authorize an execution against the joint securities of the administrators, for the reason, that by joining in a joint bond, they become liable for the acts of each other, and both are bound to protect the securities, against the acts of each.

The bond, however, is not before us, and we cannot pronounce an opinion upon its legal effect. It may however be said, that the authorities referred to by the plaintiffs counsel, show, that if co-administrators join in a joint bond, they are liable for the acts of each other, and both bound to protect the joint securities from the consequences of the acts of the other. 5 Pick. 96; 7 B. Monroe, 15; 6 Gill & John, 288; 2 Dev. Eq. 115; 2 Conn. 536; 5 Humph. 453. Whether the bond, however, will have the effect to make each co-administrator liable for the acts of the other, will depend on the intention of the parties, to be gathered from the instrument itself. Perkins and Elliott v. Mayfield and wife, 4 Ala. Rep. 417. The orphan's court, however, erred in dismissing the *supersedeas.*

To entitle the plaintiff to an execution on the return of *nulla bona*, upon one issued on a final decree, rendered against an administrator, he must show, that he has not only obtained a valid decree, but that a valid execution has been issued and returned, *no property.*

The execution issued against Steele, was not made returnable to a regular term of the county court, but to a day appointed by the orphans' court: such an execution is void. For although it issues on a decree of the orphans' court, it must be made returnable to the semi-annual term of the county court. Westmoreland v. Hale, 11 Ala. Rep. 127; Graham & Abercrombie v. Chandler, 12 Ala. Rep. 829.

The judgment of the county court must be reversed, and the cause remanded.

JORDAN v. ABERCROMBIE & THOMPSON.

1. Where a defendant in an action of trespass to try titles, in which a judgment has been rendered against him for the recovery of the land, and damages for its occupancy, sues out a writ of error, and dies, the suit must be revived in the names of the heirs and personal representatives of the deceased.

Error to the Circuit Court of Macon. Before the Hon. Nathan Cook.

THE facts in this case are set out fully in the opinion delivered by the court.

BELSER, for plaintiff in error.
McLESTER and COCKE, contra.

COLLIER, C. J.—The defendants in error instituted an action of trespass against the plaintiff, as well to try the title to a tract of land, particularly described in the indorsement on the writ and in the declaration, as to recover damages for its occupancy. Upon a trial on the general issue, there was a verdict and judgment for the plaintiffs below, that they recover the land, with six hundred and thirty dollars damages, besides costs. The defendant sued out a writ of error to this court, and died; and a motion is now made that the cause in this court be revived in the names of the heirs and personal representatives.

By a statute passed in 1821, the fictitious proceedings in an action of ejectment were abolished, and the action of trespass substituted as the mode of trying title to land, in which the plaintiff, is required to indorse on his writ, and the copy thereof, that the action is brought as well to try titles as to recover damages. The laws in respect to the action of ejectment, except the fictitious proceedings are declared to be applicable to the substituted remedy; and if the plaintiff is successful, it is declared that he shall be entitled to an action for

the possession, as well as for costs and damages. Clay's Dig. 320, § 43, 44, 45. The act of 1835 gives to the plaintiff, the action of ejectment or trespass to try title, at his election, and provides, that "When the action of ejectment shall be brought, it shall be lawful, and it shall be the duty of the jury trying the same, to assess the damages in favor of the real plaintiff, as in actions of trespass to try title." Clay's D. 320, § 46. By the act of 1802, it is declared, that no suit shall abate by the death of either plaintiff or defendant, where the cause of action survives, and provides the mode for its revival. Clay's Dig. 313, sec. 1.

In the State ex rel. Nabors' heirs, 7 Ala. Rep. 459, it was decided, where the plaintiff in an action of trespass to try title dies *pendente lite*, the suit does not abate; but if brought for the recovery of the freehold, its prosecution may be continued in the name of the plaintiff's heirs; and if a term of years, or mere chattel interest is sought to be recovered, in the name of his personal representatives. As the pleadings do not show the *quantum* of interest in controversy, the heirs or personal representatives, as they may agree between themselves, may be made plaintiffs, their right to recover depending upon the proof as adapted to their respective interests.

The case cited does not determine against whom the action shall be revived, where the defendant dies after the recovery of a judgment against him. This is a question *res integra* in this court, and must be determined by a reference to the interests involved, and to the parties to be affeeted by the judgment. It is our duty, if possible, to give effect to the legislation on the subject, so as to make the remedy effectual.

In Kentucky, the plaintiff in ejectment is entitled to recover, not only the land in controversy, but costs and damages also. It has been there held, a judgment in ejectment for the term, with damages and costs, cannot be revived by *scire facias* against the heirs alone; the personal representatives must also be made defendants. Mitchell's heirs v. Smith's heirs, 1 Litt. Rep. 243. The court said, "We do not intend to say that if the *scire facias* had been for execution for the term to come, alone, it might not in such a case, have issued against the heirs, without the personal representative; but

the *scire facias* in this case, claims execution, not only for the term, but for the costs and damages recovered by the judgment, in ejectment. Upon a judgment, for costs and damages recovered against the ancestor in his life-time, the heir at common law was in no manner liable; and although the heir is made liable by the act of assembly subjecting lands to the payment of debts, he is only made so in a joint action against him and the personal representative." We have a similar statute, which gives to a judgment creditor a *scire facias* against the heirs and personal representative of the deceased debtor, to show cause why the lands of the ancestor should not be subjected to execution, where the executor or administrator has failed "to apply to the orphans' court for the sale of the real estate, for the purpose of paying the debts." Clay's Dig. 197, § 27.

In the case before us, if the title to the freehold is in controversy, it is clear that the heir is the proper representative of the deceased defendant, as it respects the lands; but he is not primarily liable to pay the damages and costs which have been adjudged. The administratrix is chargeable with the debts of her intestate, whether due by parol, or matter of record; the damages and costs recovered are as much a debt, as a judgment on a promissory note, or the note itself. To revive such a judgment we have seen that the heirs and personal representatives should both be made defendants. This is indispensable to give to the plaintiff complete execution of his judgment. If the defendant had died before the writ of error was sued out, or if the writ should abate, the plaintiff could only enforce his judgment after revival against the real and personal representative, and both the latter might unite in prosecuting a writ of error upon the order of revival. Why then should they not be allowed to revive the writ of error which issued in the life-time of the defendant, and thus make themselves parties to the judgment of the circuit court? Tho anomaly of uniting the heirs and personal representative, would not be more striking in the one case than the other.

Unless the course indicated be allowed, the judgment of the circuit court cannot be revised here. The heirs can only represent the land; the administratrix is the sole representative of the personal estate, and is chargeable with the pay-

ment of the damages and costs; and each part of the judgment must be represented, to authorize us to scan its correctness—to affirm or reverse it, as the law may require. We cannot entertain one writ of error by the heir in respect to the land, and another by the administratrix in regard to the damages and costs. This would be to permit several writs of error to be sued out upon one judgment, thus destroying its unity—a course of proceeding against all precedent, in this court at least.

We therefore conclude, that the only mode in which the remedy in this case can be made effectual, and the intention of the legislature upheld, will be to allow the motion to revive: and it is granted accordingly.

THOMAS ET AL. v. DENTON ET AL.

1. M. M. executes a deed, by which, she "gives, grants and bequeaths, unto W. S. and N. A. S.," together with "*all the heirs of P. S.'s body*, the sole right and title" to a female slave, and her increase, "to be the only right, and property of all her, the said P. S.'s children:" and warrants the title "to the aforesaid P. S.'s heirs forever." *Held:* that the deed vests the title to the slave immediately in the donees, who at the time of its delivery were capable of taking, and, it creating no trust, the after born children of P. S. can take no interest under it.

Error to the Chancery Court of the 23d District. Before the Hon. W. W. Mason, Chancellor.

The bill in this case was filed by defendants in error, against plaintiffs in error, to enforce a trust, which it alleges was created in their favor, by a deed of their grandmother, Margaret Millwee. The deed is in the following words:

"The state of Alabama, Jefferson county: Know all men by these presents, that I, Margaret Millwee, of Jefferson county, and state aforesaid, for, and in consideration of the

love, good will and affection, that I bear towards my well beloved daughter, Polly Seays, do, by these presents, fully give, grant and bequeath, unto William Seays and Nancy Ann Seays, together to all the heirs of the aforesaid Polly Seays's body, the sole right, title, to a certain negro girl named Rose, aged seven years, with the increase, if any, equally between all the children or heirs of the body of the aforesaid Polly Seays, to be the only right and property of all her, the aforesaid Polly Seays's children: which negro I do hereby warrant, and forever defend, unto the aforesaid Polly Seays's heirs forever, against myself, or against any person lawfully claiming, or to claim the same. In testimony whereof, I have set my hand, and affixed my seal, this 12th day of February, 1823. MARGARET MILLWEE."

The bill states, that William Seays, who is named in the deed, died in 1838, leaving no issue, and that the said Polly, after the execution of the deed, had two other children by her then husband, Jennings Seays, viz., Margaret A., now the wife of Benjamin C. Thomas, and James Seays, who, together with the said Nancy Ann and her husband, William Waddle, have taken possession of said Rose, and her children, and are asserting an exclusive claim to them. It also states, that the complainants are the children of the said Polly Seays, by a second marriage, with one James W. Denton.

The prayer of the bill is for relief appropriate to the facts above set out.

The chancellor rendered a decree in accordance with the prayer of the bill, which is now assigned as error.

PECK, for plaintiffs in error.

The children *in esse* at the date of the deed, and named in it, took an absolute estate in the slave, disembarrassed of the trust sought to be established by the bill. No trust is declared by the deed, and none can be raised by implication. If the instrument was a testamentary paper, and not a deed, the case might be different. Shepherd v. Nabors, 6 Ala. R. 631, 636, and cases cited. There can be no shifting or secondary use, or springing use, raised in such a case, nor resulting trust. 4 Kent's Com. 296 to 298, and 306. Again, if the construction contended for could prevail, the power of

alienation would be suspended for an indefinite period. 4 Kent's Com. 271, and note a; 3 Coke, 293, 294, note c, 296, note d; 2 Black. Com. mar. 398, note 11; same book, mar. 401; 2 Coke, 593, note 4.

P. & J. L. MARTIN, and HUNTINGTON, contra.

It is probable that the bill goes too far, in alleging that the great grand-children of Margaret Milwee would take under the deed, but the case of Murray and Buchanan v. Walker, 1 Strobhart's S. C. Eq. Rep. 193, 196, is direct to the point that the *post-nata* grand-children of Margaret Milwee, (who are the complainants,) are entitled to a share *per capita* under the deed. This is all the bill contends for. In the case referred to, Margaret Jeffreys, by her deed, gave to the "issue of her daughter Mary," (naming them,) and also those children she (her daughter) might bear to or by her son-in-law, the half part of a negro woman and her increase. Mary, the daughter, had a child named Margaret, after the deed was made, and this child was decreed to have been properly let in to a share of the negroes. "I am of opinion," says Chancellor Johnson, confirmed by the court, "she took an absolute interest, which vested in her husband," &c.

CHILTON, J.—In Shepherd v. Nabors, 6 Ala. Rep. 631, it was held, that a deed by which a father gave to the heirs born of his daughter's body, a female slave, providing that he should retain the possession of the slave during his life, and at his decease, the slave should be "in full possession of the heirs born" of his said daughter, was a testamentary paper, and might be proved as such; and that all the children to whom the daughter gave birth, might claim an equal interest in the slave and her increase, under the deed as an executory devise.

So in Dunn and wife v. The Bank of Mobile, 2 Ala. Rep. 156, it was held, that if necessary to give effect to the intention of the donor, the deed would be regarded as a testamentary paper, and the provision for the after born children would take effect as an executory devise.

In the case at bar, however, the deed is not set up as a tes-

tamentary paper, but the plaintiffs, all of whom were born after its execution, insist upon it as vesting in them an estate in common with the grantees named therein, and the question is, can the deed so operate as to open and let in the after born children. It is an absolute conveyance to the donees of the slaves in question. Its language is, "I give, grant and bequeath unto William Seay and Nancy Ann Seay, together to all the heirs of Polly Seay's body, the right, title, &c., to a certain negro girl and her increase (naming her) equally between all the children or heirs of the body of the said Polly Seay, to be the only right and property of all the said Polly Seay's children, which slave I do hereby warrant and defend to all the said Polly Seay's heirs against myself, &c."

It is needless to speculate upon the supposed intention of the donor, in the use of the words, "heirs of the body of Polly Seay." Conceding that the word heirs is a synonym for children, as *nemo hæres viventis*, still the deed vests the interest in the slave immediately in the donees, who, at the time of its delivery were capable of taking, and there being no trust created by the terms of the deed, it would follow, that the complainants not then *in esse* could take no title under it. Granting that there may be cases, where executory trusts in behalf of after born children may be created by deed, as was the case in Murray et al v. Walker, 1 Strobhart's Eq. Rep. 193, no benefit can accrue to the plaintiffs below, from the concession, as the deed in this case makes no such provision for them. Neither can they, for the same reason derive any aid from the doctrine of springing, future, or contingent uses. "Springing uses," says chancellor Kent, (4 Com. 296 *et seq.*) "are limited to arise on a future event, where no preceding estate is limited, and they do not take effect in derogation of any preceding interest." If the conveyance operates by way of transmutation of possession, the estate must be conveyed, *and the use be raised out of the seizin created in the grantee by the conveyance.* Or the use may, by the conveyance, be severed from the grantees seizin, in which case the statute executes it, as in conveyances to stand seized &c. Future uses are limited to take effect as remainders. This doctrine more particularly applicable to

real estate, can certainly have no influence upon the deed before us, as the estate passes *in praesenti* by this deed, and no words creating an estate or use *in futuro* in the *post nata* children, are employed. The donees take the absolute estate, and the complainants, having no interest can take nothing by their bill. We are not allowed, as we can conceive, to imply a trust against the words of the deed, and thus to impose a restraint upon the alienation of the property for the life of Polly Seay.

Our conclusion is, the chancellor erred in his decree. It is therefore reversed, and a decree here rendered dismissing the bill, at the cost of the defendants in error.

MARTIN v. THE BRANCH BANK AT DECATUR.

1. Where a judgment is rendered against two defendants, and one dies, the lands of the survivor may be sold, under an execution, issued on such judgment, without its being revived by *scire facias*.
2. Under the joint resolution of the general assembly of the 31st December, 1842, the Bank of the State of Alabama and its branches have the power to purchase real estate sold under executions in their favor.

Error to the Circuit Court of Madison. Before the Hon. Sidney C. Posey.

This was an action of trespass, to try title to several tracts of land in Jackson county, and to recover damages for the occupancy thereof, instituted by defendant against plaintiff in error, in the circuit court of Jackson, and transferred, by change of venue, to the circuit court of Madison. At June term, 1839, of the county court of Morgan, the defendant in error obtained a judgment against William G. Martin, Lewis & Davis, and Harris & Snodgrass, for $1756 13, &c., on which execution issued on the 30th July, 1839, and was returned unsatisfied.

In 1840, Lewis, one of the defendants in the judgment, and in 1841, Davis, another of them, died. After the issuance of the first execution, several others, both before and subsequent to the death of Lewis & Davis were issued, and on the 29th July, 1844, a *pluries* was placed in the hands of the sheriff of Jackson county, who levied on the lands in controversy, as the property of William G. Martin, one of the defendants in said judgment, and sold them, and executed a deed therefor, to the defendant in error. William G. Martin was in possession of the lands, at the time the judgment was rendered, under legal title, and the plaintiff in error, who claimed title under him, was in possession of them at the institution of the suit, and up to the date of the trial.

The court charged the jury, in substance,

1. That the fact, that Lewis & Davis, two of the defendants, were dead at the date of the issuance of the execution, under which the sale of the land was had, did not render the execution void, or invalidate the sale.

2. That the defendant in error was capable of buying and holding real estate, sold under execution issued on a judgment in its favor.

To these charges the counsel of the plaintiff in error severally excepted, and now assigns them as error.

S. Parsons and J. Robinson, for plaintiff in error.

It is settled in this State, that if a sole judgment defendant, or one of two judgment defendants die, his land cannot be sold under an execution afterward issued, without reviving. 16 Mass. Rep. 192; 20 Johns. R. 119; 5 Ohio, 221; 2 ib. 414; 10 Wend. 211; 4 Ala. 681, 735, 750; 7 ib. 660; 11 ib. 431; and Burk's adm'r v. Jones & Allen, 13 Ala. 167. And it is elsewhere very fully held, that an execution can not issue, in such case, against the land of the survivor, until the judgment be revived, and that an execution issuing without this is void. 1 Cowen's Rep. 711, 738; 4 Howard's U. S. Rep. 88: and see Stewart v. Nuckles, decided at this term.

By the death of one of several defendants in a judgment, the entire judgment, as to the land of the defendants, becomes inoperative until revived on *sci. fa.*; or if by suggestion even as to lands, still the action of the plaintiff and of the court

are necessary. Jones, adm'r v. Swift, 12 Ala. 147. It is until revived, but a *chose in action.* A *sci. fa.* is a new suit, and the defendant may plead. 2 Wms. Saunders, 71, note 4. It is a right which the surviving defendant has to remain exempt from the judgment as to his lands, until revived by *sci. fa.* against the heirs and *terre tenants* of the deceased, so that they may contribute. 1 Salk. 319; 4 Modern, 316; 4 How. 58. And where one of several defendants in a judgment die, if the plaintiff wish to proceed against the land, he may have a *sci. fa.* to subject the land and goods of the survivor, and to subject the land of the deceased in the hands of his heir and *terre tenants.* 2 Tidd's Pr. 1033; 1 Salk. 319; 1 Cowen's Rep. 739. Thus the heir is to be contributory, and in this way the survivor is not to be injured, and a multiplicity of suits for contribution avoided. The judgment having lost its operation and effect as to the land, the execution, which included the land, varied from it. But an execution must follow the judgment, as it actually is in effect at the time. Underhill v. Devereux, 2 Saunders' Rep. 72, n. 4, top p. 216 and 220 note; 1 Salk. 319; 2 Tidd, 1029; 1 Cowen, 738, 741; 20 Eng. Com. L. Rep. 475-6-7; 2 Tidd, 999, marg.; Clancy's Hus. and Wife, and cases cited.

C. C. Clay, Jr., contra.

I. The bank had an unquestionable right to purchase land at her own execution sale. Clay's Dig. 120. But, if there is any doubt of the construction of the foregoing act, on a perusal of the act by itself, that doubt is wholly removed by the joint resolutions, passed at the same session of the legislature, and approved Dec. 31st, 1842. (See acts of Gen. Assem. 1842-3, p. 221-2.) They were passed "in contemplation" of "liquidation," and "with a view to this object," (see preamble,) and, after declaring in the first resolution, that "the powers of the branches at Mobile and Decatur, &c. to *make settlements* with the debtors of said branch banks, by *receiving* real or personal property, *in payment of debts*, be and the same are hereby suspended," the legislature, by the 2d resolution, empowers said banks "to take liens on real and personal property to secure bad and doubtful debts," and "to purchase any lands, tenements or hereditaments, &c., at

any sale under any mortgage or deed of trust, made to secure the payment of any debt or liability, due or owing to said branch banks, or *at any sale under any execution in favor of the president and directors of the same*, whenever they shall be of opinion that the interest of the said branch banks require any such purchase to be made." Joint resolutions have all the force and effect of statutes; and statutes enacted at the same session of the legislature, are to be taken *in pari materia*, and should be so construed as to give effect to *each if possible*. Smith's Com. on Stat. and Constructions, 755, § 641; Wyman et al. v. Campbell et al. 6 Porter, 219; Kinney v. Mallory, 3 Ala. Rep. 626.

The execution is not void as to the surviving defendant, on whose lands it was levied. At most, it was only voidable. The facts are, that judgment was obtained against all the defendants—Lewis and Davis as principals in the note sued on, and William G. Martin, Harris and Snodgrass, as securities; that a *fi. fa.* issued against all in their life-time, and was levied on this land of William G. Martin, for want of personal property on which to levy, and returned not sold, for want of time; and a *venditioni exponas* issued, which was never executed or returned. Then Lewis and Davis died; and after a lapse of two terms, an *alias fi. fa.* issued, and six *pluries* regularly; the last of which was levied on the same land of William G. Martin, the surviving defendant; the land was sold, and the bank purchased. No suggestion of Lewis's and Davis's death was entered on record, and no *sci. fa.* issued.

An original *fi. fa.* issued after the death of a sole defendant is void, according to decisions in 11 Ala. Rep. 433; 7 ib. 660; 6 ib. 55; 4 ib. 667; 3 ib. 254.

In the case of joint judgment debtors, this court has held that an execution issued after the death of one, and levied on his property, would be void as to him. But this court does not go to the extent claimed by the counsel of the plaintiff in error, and say, that it is void as to survivors, or that it is indispensable that the death should be suggested, and *sci. fa.* issue to the executors and heirs of the deceased, in order to charge the survivor. The language of the court is, "the fact that there is a plurality of defendants in the judgment, will not render a different rule applicable in respect to one

who is dead. The death might be suggested, and execution issue against the survivors." Jones, adm'r, v. Swift, 12 Ala. 147. So, this court held, that an execution issued after death of a defendant, and levied on his lands, is void. 4 Ala. 681, and 751.

It is well settled by the highest authorities, that an execution may issue after the death of one of several defendants, against all, without suggestion of the death or revival by *sci. fa.*, it must conform to the judgment, and issue against all the defendants. 2 Saund. 72, k. note 4; Bingham on Ex. 137; 1 Archb. Prac. 295; 2 ib. 92; 2 Tidd's Prac. 1009; 9 Mass. R. 19, and note b; 4 Howard's U. S. R. 78; 1 Cow. R. 711; 3 Smedes & Marsh. 17.

The cases of Woodcock v. Bennett, 1 Cowen, and Erwin v. Dundas, 4 How. 78, cited by plaintiff's counsel, admit that, had execution been levied on the goods and chattels of a surviving defendant, it would have been regular, because, at common law, the charge of the judgment, being personal, survived. But, inasmuch as it issued against lands of both deceased and survivor, it is void; because, they say, the charge of the judgment on the realty does not survive.

And this presents the true question, whether the distinction made between subjecting lands and goods of a surviving co-defendant to execution, obtains in Alabama—in other words, whether you may not levy on and sell the land of a surviving co-defendant, as well as his personalty, without suggesting the death of his co-defendant, and running a *sci. fa.* to his heirs and executors? This question has never been decided by this court.

That an execution issued against joint defendants, after the death of one, may be levied on the goods of a survivor, though not on the goods of the deceased, without revival by *sci. fa.*, is abundantly proved by the authorities cited. The direction to sell the goods of the deceased, contained in the writ, does not vitiate it. Then the execution may be good as to the personalty of a survivor, though void as to that of the deceased. Why, then, should the execution be void, because it directs the sale of the land of a dead defendant, as well as of a survivor?

A survivor has not the same reason here, as in England,

for objecting that the judgment was not revived by *sci. fa.* against the heirs of his deceased co-defendant, for there the lands of all the defendants were extended alike, and one might plead in abatement of the writ, if the lands of his co-defendants were not extended equally with his own. 2 Saund. 46, and note 10. But here, as he could not make that plea while all were living, why should the death of a co-defendant entitle him to it? In support of this view, it has been decided, that if one of several parties to a judgment die, after judgment and before execution, a *sci. fa.* is not necessary to authorize execution against the survivors. If it issue against all, without the suggestion of the death of one, survivors cannot take advantage of it. Johnson v. Lynch and Adair, 3 Bibb, 334; 1 Litt. 244; Hamilton v. Lyman, 9 Mass. 14; Davis et al. v. Helm, 1 Smedes & Marsh. 17. So, it has been held, that where judgment was rendered against two, and execution issued against one, though irregular, erroneous and voidable, it was not void, so as to invalidate a levy thereof on land, a sale, and sheriff's deed. 6 Humph. 281.

DARGAN, J.—The material inquiry in this case is this: If a judgment be rendered against two, and one die before execution is issued, can an execution be issued and levied on the lands of the survivor, without a *sci. fa.*, and by a sale thereof, pass the title to the purchaser?

By the common law, if judgment was rendered against two, but one died before the execution issued, nevertheless the plaintiff might sue out execution, and have it levied on the goods of the survivor. Bingham on Ex. 135; 2 Tidd, 1120; 16 Mass. 193; 3 Bibb, 334; 4 Howard, 58. The execution, however, for the sake of conformity with the record, issued as against both; but was in law an execution against the survivor only, and his goods alone could be levied on in satisfaction of the judgment. But if the judgment was against a sole defendant, and he died before execution was issued, no execution could be issued, without a *scire facias* to his representatives.

These are the general rules applicable to executions, so far as they affect the goods and chattels of the defendants. By

the common law, goods could not be sold at all, for the payment of debts, by any judicial process, and the question we are examining, must therefore be solved by a proper construction of our statutes, subjecting lands to the payment of judgments, and prescribing the mode by which they shall be sold.

By the act of 1812, (Clay's Dig. 205) lands are made liable to all judgments and decrees rendered by any court of record, and the clerks are required to frame their executions accordingly. Under this act, the *fi. fa.* is issued against the goods and chattels, lands and tenements, and the lands are equally liable, under this process, to be sold; and the sale, and execution of the sheriff's deed, will pass to the purchaser a *fee simple* title.

Lands, then, are liable to be sold for the payment of debts under the same writ, by which goods are sold; and the land of one defendant may be sold, although no levy or sale is made of the land of the other; or the lands of both may be sold, as the goods of one, or both of the defendants might be, at the common law. It may well, then, be asked, if lands, in this state, are liable to be sold under execution, by the same writ, by virtue of which, the goods are sold, and the goods of a surviving defendant may be sold without a *sci. fa.* why deny the right to sell the lands, when both the land and goods are liable, under the same writ, to be sold for the payment of the debt? If the goods of the survivor can be sold without a *sci. fa.*, his lands, which are placed on the same footing, it would seem might be also.

It is true, that there are to be found decisions to the contrary. In the case of Erwin's lessees v. Dundas, 4 Howard, 58, it is said, that if one defendant die, although the execution may go against the goods of the surviving defendant, it cannot be legally issued against his lands, unless it has been revived against the heirs of the deceased defendant. Why is this? Why may not the plaintiff proceed against the land of the survivor, in the same manner that he might against his goods? Both are equally liable to the judgment: both may be sold by the same writ, if the other defendant is in life; why not, if he is dead? No answer, in my opinion, can be given. It is a little strange, that the court did not notice our statute law, in the opinion delivered in the case referred to.

The land in that case, was sold under our law, and the validity of the sale did not depend, so much on the statute law of Great Britain, as it did on the local law of Alabama; yet the reasoning of the judge is drawn entirely from the statute of Westminster the 2d, Edward the 1st, and the decisions of the English courts upon that statute, without noticing the marked difference between the English statute and our own. Here, we sell, absolutely and by the same process, goods and chattels, lands and tenements; but under the statute of Great Britain, one half the defendant's land was extended in payment of the judgment. If the judgment was against two, being joint, each defendant had the right to insist, that one half of the land of his co-defendant be extended, in order, that the burthen might be lighter on him. He could say, the charge was joint on the lands of both, and both jointly must bear the burthen. But if one defendant died, before execution issued, the lands descended, and the title vested in the heir. He had the right to show cause (as he had never had a day in court) why the judgment was not a charge on his land, and therefore a notice or *scire facias* must issue to him before his lands could be taken in execution. The lands of the surviving defendant being chargeable jointly with the lands of the deceased defendant, and he having the right to insist, that this charge should be equally divided between them, the plaintiff in execution could not extend his land without a *sci. fa.* If, therefore, the goods of the survivor were not sufficient to satisfy the debt, the plaintiff could not proceed by his writ of *elegit*, neither against the heir of the deceased defendant, because he was entitled to have a day in court; or against the surviving defendant, because he had the right to show that the land, descended to the heir of his co-defendant, was jointly liable with his own, to pay and satisfy the charge. Hence arose the necessity of a *sci. fa.* against the surviving defendant, before his lands could be taken in execution. But under our statutes, judgments are joint and several, and executions may be levied on the lands of one of the defendants alone, without levy on the lands of the other, as, at the common law, they could be levied on the goods of one alone, notwithstanding the other had goods liable to the execution. The decisions, therefore, of the English courts,

under their statute, ought not to be adopted here, as ours is entirely different in its legal consequences, and places lands on the same footing with personal property, in reference to the payment of judgments; that is, they may be absolutely sold, under the same process, and a perfect title passed to the purchaser: and the land of one may be sold, though no levy is made on that of the other. It thus being the right of the plaintiff to sell the land of one, without reference to the other, as, at common law, he could sell the goods of one, without making any levy on the goods of the other. I cannot, myself, perceive any reason for a *sci. fa.* against a surviving defendant, for it would answer no purpose, and would not benefit him. The case of Erwin's lessees v. B'k U. S., before referred to, is in accordance with the case of Woodcock v. Bennet, 1 Cowen. That case, however, if good law at all on this point, must depend on the statute law of New York, or on the statute of Westminster 2d, if it has been adopted in that state. The whole reasoning of the court is drawn from the English decisions made in reference to this statute, and which, of course, would be inapplicable to ours, differing from it, as it does, so widely in its terms. It is supposed, however, that we have heretofore adopted the rule of construction that has obtained in England, and seems to be recognized in New York. It is true, we have held, that the land of a deceased defendant could not be sold, under execution issuing after his death, without *sci. fa.* to his heirs. This is expressly required by the act of 1828. Clay's Dig. 197. But the question here raised, has never before been made in this court, and we feel bound to decide it upon our own statutes, and we believe, that a just construction of them warrants us in saying, that the lands of a survivor may be sold under execution issued after the death of a co-defendant, without a *scire facias.*

2. The other question presented by the record, that the plaintiff was incapable of purchasing real estate, is fully answered by the joint resolution of the general assembly, of the 31st December, 1842, by which the bank was authorized to purchase under executions in its own favor. We can see no error in the record, and the judgment must be affirmed.

HAMILTON ET AL. V. ADAMS.

1. A court of equity cannot interpose by injunction, to restrain a plaintiff, who has obtained judgment, on a writ of forcible entry entry and detainer, from having restitution of the possession, notwithstanding he is insolvent, and the complainant holds the undisputed legal title to the land.

Error to the Court of Chancery of the 40th District. Before the Hon. D. G. Ligon, Chancellor.

THE bill in this case was filed by plaintiffs, against defendant in error, and alleges, that complainants, Carter T. Hamilton, and William C. Hamilton, deceased, the father of the other complainants, on the 24th December, 1844, purchased from William P. Chilton, the south half of section of land nineteen, township twenty-one, and range four, east, in the county of Talladega, and received from him a bond for titles, but which, by mistake, was made to said William C. Hamilton alone, instead of to him and complainant, Carter T., jointly: that said Chilton held the patent for said land: that on the 8th February, 1845, complainant Carter T., and said William C., went on the said land, and finding one Benjamin F. Adams thereon, who had taken possession without shadow of title, they peaceably removed his goods and chattels, out of one of the rooms of a dwelling house on said land, into another, and occupied that from which they had removed them: that said Adams thereupon sued complainant Carter T., and said William C., in an action of forcible entry and detainer, before a justice of the peace, and judgment was rendered against them: that they took the case by *certiorari* to the circuit court of Talladega county, where it was affirmed, on the 4th April, 1846: that said Adams also sued them for the alleged trespass on said land, and has recovered a judgment for $25, which they have paid: that said Adams now threatens to sue out a writ of restitution in said forcible entry and detainer case, and to turn out complainant Carter T., and the children of the said William C., the other complainants, when in equity they are the only parties entitled to the occupancy

of said land: that they have made valuable improvements: that said Adams is a mere trespasser on said land: has occupied it four years, without paying a farthing to the real owner, is insolvent, and nothing can be recovered out of him: that he has hitherto committed, and will continue to commit, waste on it, by cutting down and burning the timber: that said Chilton has an action of trespass to try titles pending against said Adams, in the circuit court of Talladega, for the benefit of complainants: and that said Adams, being insolvent, if he turns complainants out of possession, is wholly independent of the law as to recovery, that may be had against him.

The bill prays that Adams be enjoined from proceeding with his writ of restitution, temporarily and perpetually, and also from the commission of waste, &c.

The defendant Adams, in his answer, denies title in Chilton and complainants to the land, denies that complainant Carter T., and said William C., entered peaceably, denies his insolvency, and insists, that he claims, not as a trespasser, but under title. He also denies the commission of any waste on said land, and prays that his answer may be taken, as a general demurrer to the bill.

There are several exhibits in the record, both to the bill and answer, but the patent to Wm. P. Chilton appears to be the only proof that was made on the hearing.

The chancellor dismissed the bill, and his decree therein is now assigned as error.

Morgan, for plaintiffs in error.

In this case, the title to the land is in the complainant. The defendant is in possession, not only as a trespasser, but in direct violation of the Creek treaty of March, 1832, it being a reservation under that treaty. The defendant not only commits waste, but contends for the possession, and has a writ of restitution against the real owners of the land. Lyon v. Hunt, 11 Ala. 297, is a full authority on all the points in the case, and sustains the right to relief on all the grounds stated in the bill. The complainants are in possession, and could maintain no action at law, to settle the question of title.

S. F. Rice, contra.

COLLIER, C. J.—The equity of the complainants' bill, so far as it seeks to stay the commission of waste, is perhaps defensible. Lyon et al. v. Hunt et al. 11 Ala. R. 295. But in respect to the allegations that the complainants are *bona fide* purchasers from the patentee of the land in controversy, and hold his bond for a title, that the defendant is insolvent, and will cause them to be dispossessed under a judgment he has recovered against them, in a proceeding for a forcible entry and detainer, unless restrained by injunction, they furnish no warrant for the interposition of equity.

The proceeding for a forcible entry and detainer, is a civil remedy under our statutes, intended to restore a person to the possession of lands, which have been tortiously entered upon, and detained with force or strong hand. It is instituted by a complaint, addressed to a justice of the peace, and the trial is by jury. If a verdict is found for the defendant, judgment shall be rendered thereon, with costs; and the justice shall issue a writ of restitution, directed to the sheriff, "to cause the complainant to be reseized, or repossessed," also to make the costs, &c. After judgment, the proceedings may be removed before the circuit court of the county in which they have taken place. It is expressly declared, that the judgment shall be a bar to "an action of trespass, or other action against the aggressor, or party offending." *Further*, the estate or merits of the title, shall in no wise be inquired into on any complaint for a forcible entry and detainer, &c. Clay's Dig. 250 to 253.

The object of these statutes was to afford a summary and cheap remedy for the party aggrieved, and to preserve the peace and harmony of society, by preventing persons who have conflicting titles to the same lands, from redressing their supposed grievances in defiance of the law. We have seen it is provided that the title shall not be inquired into—the only question being, who was in possession, and how that possession was lost. It is therefore immaterial how perfect a man's title may be, if he enters upon the possession of another who has no title whatever, by violence, he cannot protect himself against the proceeding for a forcible entry and detainer. Davidson v. Phillips, 9 Yerg. Rep. 93; Childress v. Black, ib. 317; Turner v. Lumbrick, Meigs's Rep. 12;

Childress v. McGehee, Minor's Rep. 131; Ward v. Lewis, 1 Stew. Rep. 26; Lecatt v. Stewart, 2 Stew. R. 474; Wright v. Mullen, 2 Stew. & P. Rep. 219; Singleton v. Finley, 1 Port. Rep. 144; Cunningham v. Green, 3 Ala. Rep. 127; Clark v. Stringfellow, 4 Ala. Rep. 353; McRae v. Tillman et al. 6 Ala. Rep. 486.

The purpose of the statutes being to redress the party whose possession has been invaded, and to place both parties in the same situation they respectively occupied previous to the commission of the grievance, it is not competent for a court of chancery to interpose by injunction, and arrest the execution, upon the allegation of the plaintiff's insolvency. The exercise of such a jurisdiction would defeat the design of the legislature, and be an interference above, or in despite of the law. If the defendant had not intruded upon the plaintiff's possession, but for the purpose of vindicating his title, had resorted to an action of trespass, or ejectment, he could not, by the action of any tribunal, compel the party in possession to give security for the payment of such damages as might be recovered. It is difficult, then, to perceive any ground upon which he can indirectly effect that object by being maintained in his possession, and thus preventing the defendant from receiving the rents and profits of the land, which furnish the cause and criteria of the damages. He must submit to repair the wrong which the verdict and judgment ascertain he has committed, and assert his title in the legal mode.

In Dedham v. Smith et al., 2 A. K. Marsh. Rep. 260, it was decided that a successful plaintiff in a warrant of forcible entry and detainer, should not be restrained from having restitution, because the defendant has recovered a judgment in ejectment for the premises. So it has been held that a court of chancery cannot rightfully award an injunction against a writ of restitution, upon a conviction of forcible entry and detainer. Hamilton v. Hendrix' heirs, 1 Bibb's R. 70; see also 1 Monr. Rep. 190. The case of Ashby v. Kizer et al., 1 Gilmer's Rep. 153, is unlike the present. There, it was determined that a court of equity has jurisdiction to stop proceedings at law to reverse a judgment on a writ of forcible entry, in which a second writ of restitution had been

granted—the first being lost, without any fault in the complainant. This was certainly a very singular case, depending upon facts peculiar to itself, and the reasoning upon which the opinion of the court rests, is so entirely foreign to the question before us, that we will not attempt to recapitulate it. The citation from 14 Vin. Ab. tit. Injunction, merely states, that the Lord Chancellor showed the compiler a note of a cause in chancery of 20th Hen. the 8th, by which it appeared, that an injunction issued to restrain the prosecutor *not to pay restitution upon an indictment of forcible entry.* But it is difficult to perceive why it was necessary for the defendant in the last case to resort to chancery to protect his possession; for it is said, that the Court of King's Bench has such a discretionary power over the subject from an equitable construction of the statutes, that if a writ of restitution shall appear to have been illegally awarded, or executed, that court may set it aside, and grant a re-restitution to the defendant. 4 Bac. Ab. tit. Forcible Entry and Detainer, letter F. and G.

Although we have seen that the bill might be sustained in respect to the waste alleged to have been committed and contemplated, yet the case is not even to this extent made out by the proof. The defendant does not admit the legal title of the vendor under whom the complainants profess to claim, or the equitable title they assert in virtue of their purchase, but requires them to prove it. The only evidence upon these points, is the patent from the United States to their vendor. It was incumbent on the complainants to have shown their right to file a bill. This could only be done by proof of the title they allege; in the absence of such evidence, it is clear that they are not entitled to the relief they seek. This view relieves us from further considering the defence; and we have only to declare that the decree is affirmed.

Chilton, J., not sitting.

WHITLOCK v. STEWART, ET ALS.

1. H. lent his note for $200 to S, receiving from the latter, horses, in pledge for his indemnity. S. afterwards lost the note at gaming, and notified H. of the fact—Held, that although H. was not bound to surrender the horses, whilst the note, without his fault, was outstanding, yet if after notice of the loss of the note, H. undertook to determine between him, and the holder of the note, and decided in favor of the latter, without being compelled to do so by suit, he acts at his peril, and must sustain the loss.

Error to the Circuit Court of Cherokee. Before the Hon. Sidney C. Posey.

THIS was an action of trespass for a malicious arrest, and false imprisonment, instituted by plaintiff against defendants in error. The arrest and imprisonment having been proven by plaintiff, the defendants introduced evidence to shew, that plaintiff had procured from one Heard, the loan of his, Heard's note, for two hundred dollars, and had placed in his possession several horses as an indemnity against its payment: that subsequently plaintiff had clandestinely taken the horses out of Heard's possession, and that Heard had reclaimed them: that at the time of the arrest, the defendants, one of whom was Heard's agent, had received information of plaintiff's intention to re-take said horses by force: that the two hundred dollars note was presented to Heard by one Stypes, after its delivery to plaintiff, and that Heard gave him a note, which he had since paid. The plaintiff then proved that he had lost the $200 note, at a game of faro, and that the next day after he had so lost it, it was won from the faro dealer by Martin and Stypes, and that Martin had relinquished his interest in it to Stypes for a debt due by Martin to him. Heard was notified by plaintiff the day after the loss of the note, that he had lost it at gaming, and cautioned not to pay it, but the evidence was conflicting as to whether the notice was given before or after the new note was executed to Stypes, but it was given before the payment of this substituted note.

An objection was raised in the course of the trial, as to the admissibility of a portion of the defendant's testimony, but it is not involved in the points decided.

The plaintiff asked the court to charge the jury, 1st. That if they believed from the testimony, that the plaintiff lost the note at gaming, and it was in the hands of one who was not a *bona fide* holder without notice, and that plaintiff notified Heard that the note had been lost at gaming, and not to pay it; then Heard was not entitled to indemnity for costs, before he was bound to litigate it.

2. That if they believed, that plaintiff lost the note at gaming, and it was in the hands of one, who was not a *bona fide* holder without notice, and plaintiff notified Heard, that said note had been lost by him at gaming, and not to pay it, then Heard was not authorized to pay said note, because he had not been indemnified for costs of its litigation, unless such indemnity had been demanded and not given.

The court refused to give either of these charges, and charged the jury at the instance of the defendants, that if they believed plaintiff loaned his note for $200, which plaintiff lost at gaming; and for the re-payment of the note, plaintiff gave him a lien upon his horses; and Heard, before notice of the manner of plaintiff's loosing it, took up the note, and gave a new one, payable to the transferee, then Heard was not bound to lirigate the right of the transferee, to recover, unless some indemnity for costs were tendered him.

To the refusal to give the charges asked, and to the charge given, the plaintiff excepted, and now assigns them as error.

Woodward and Rice, for plaintiff in error.

The charge that Heard was not bound to litigate without indemnity, if true, wonld make a contract valid, which is of a class which this court has pronounced utterly void, and contradict the general principle of the law, that a contract which is void can not be purged of its taint. Barker v. Callaghan, 5 Ala. Rep. 708 : and Whitlock v. Stewart et al. 13 ib. 790.

It is unnecessary to adduce any authority to show that the declarations of Castleberry were incompetent—he being within the reach of *subpoena*.

L. E. Parsons and J. B. Martin, for defendants.

I. Where hearsay constitutes a part of the *res gesta*, showing the motive by which a party is prompted to action, it forms an exception to the general rule, and is admissible. 1 Phil. on Ev, 231; 1 Geenl. Ev. 112, 113.

2. See the case when last in this court, reported in 13th Ala. Rep. 790, by the name of Whitlock v. Stewart, et al.

CHILTON, J.—When this case was here at previous term of this court, (13 Ala. Rep. 790,) we held, that if Heard, after being notified that Whitlock had lost the note by gaming, and after having been requested not to pay it, had notwithstanding, proceeded to make payments, such payments did not constitute any charge upon the property pledged for his indemnity. And upon the hypothesis that the substituted note, or a portion of it remained unpaid, we said, that Whitlock should be bound to indemnify Heard against the expenses of defending against it, before he could terminate the bailment and take the property which had been pledged for Heard's protection. Also, that a charge which denied to Heard, any indemnity against the substituted note, if given before notice of the manner in which Whitlock lost the original, was properly refused.

It is very clear, that Heard, having a lien on the property in his possession to indemnify him against the two hundred dollar note, was not bound to surrender it until the note was delivered up to him, or if notified of its loss by gaming, until he was indemnified against the cost and expenses of a suit upon it. The argument, that the note being void in the hands of the winner, could create no liability on the part of Heard to pay it, and consequently that the lien was discharged, would be conclusive, if one could not be harrased and put to expense in defending against a void note. If the note is found in the hands of a third party asserting title to it, without any fault on the part of Heard, he was not bound to let go his hold on the property pledged for his protection, until he was otherwise indemnified. On the other hand, if, with a knowledge that Whitlock had lost the note by gaming, and being cautioned not to pay it, Heard had substituted a new note in its stead, and cancelled the original note, his

lien on the property by virtue of the original pledge is gone. So also, if he received notice of the manner of the loss after executing the new note, but before its payment, the same result would follow.

Although Heard was not bound to surrender the property while the note, without his fault, was outstanding against him, as he would thus have been left without any indemnity, as was previously decided in this case, yet it by no means follows that he was authorized to pay the note voluntarily though no indemnity was tendered him. On the contrary, we esteem it a clear proposition of law, that if, after notice of Whitlock's claim, and the manner of his loss of the note, Heard undertook voluntarily to determine between him and the holder of the note, and decided in favor of the latter, he did so at his peril, and if he has paid the note without being compelled to do so by suit, he and not Whitlock must sustain the loss. (See Butler & wife v. The Life Insurance & Trust Co. et al, at the last term.)

The ruling of the circuit court is opposed to this view, and required of Whitlock indemnity as a prerequisite to Heard's withholding payment of the note; whereas he was only bound to indemnify, if the note was outstanding without Heard's fault, as a condition required by law to relieve his property from the previous pledge, so as to enable him lawfully to take it from Heard's possession. It follows from what we have said that the charges asked should have been given, and that the court erred in refusing them, and in the charge given in lieu of them.

It is unnecessary to examine the question as to the admisibility of Castleberry's declaration to Ware, as the point will hardly arise upon a subsequent trial. See however, 1 Greenl. Ev. 113, Chandler v. McPherson 11 Ala. Rep. 583.; Goodgame v. Clifton, 13 Ala. 183.

Let the judgment be reversed and the cause remanded.

CHENAULT v. WALKER.

1. A sheriff is not liable to the penalty, prescribed by the act of 1843, (Clay's Dig. 238, § 9.) in cases, where by statute he is required to perform certain services, for which no compensation is fixed, if he receives more than reasonable compensation for such services.
2. The true construction of the act of 1843, is, that a sheriff or other officer shall be liable to its penalty, when he demands and receives, other, or higher fees for services, the compensation for which is defined and fixed by law.

Error to the Circuit Court of St. Clair. Before the Hon. Thomas A. Walker.

Debt, brought against the defendant, as sheriff, for taking illegal fees. The facts, so far as they are material to be stated, are, that on the 4th December, 1843, an attachment was issued against the plaintiff, and was levied by the defendant, on eight slaves. The defendant took these slaves into his possession, and retained them for twelve months, during which time, he fed and clothed them, and paid taxes for them. A judgment was finally rendered against the plaintiff, and a *fieri facias* issued thereon, bearing date the 13th September, 1844. Under this *fi. fa.*, the slaves previously levied on were sold for the sum of $2,132 75, which still left a considerable balance unpaid on the *fi. fa.* The defendant returned the execution with this indorsement: "Sheriff's fees for victualing, clothing, and paying tax for eight negroes twelve months, and commission fees on $2,132 75—$550."

The defendant also proved, that the plaintiff in the execution, had demanded of him all the money received on the sale of the negroes, except the taxed cost, which, however, he had not paid. On this evidence, the court charged the jury, that the law allowed the sheriff five per cent. on the first hundred dollars collected, four per cent. on the second, and two and a half per cent. on every hundred above two hundred dollars collected by him; the law also allowed the sheriff to retain the cost as taxed on the execution, and that if

the jury believed that the defendant had demanded, and had collected and retained more than the cost as taxed, and the commissions, that the plaintiff was entitled to recover four fold the amount of such excess. The defendant requested the court to charge the jury, that the defendant, as sheriff, was entitled to some compensation for feeding, clothing, and paying the taxes of said slaves, during the time he had them in possession, under the attachment. This charge the court gave, with this qualification, that compensation could not be allowed in this action, as it was the duty of the sheriff to apply to the court, for an allowance, and to fix the amount of compensation he was entitled to receive.

The defendant below excepted to the charges of the court, and now assigns them as error.

S. F. Rice, for plaintiff in error.

1. It was the duty of the sheriff, to feed and clothe the slaves levied on in this case, and to pay the taxes on them; the law allows him twenty-five cents per day for victualing a slave, and of course the law will allow him to retain the taxes paid on them, because it was his duty to pay the taxes, and because taxes constitute a lien superior to all others in Alabama. Clay's Dig. 235, note 1; ib. 498, § 17; ib. 566, § 50, 52; Walker v. Ham, 2 N. H. R. 238.

2. The third charge asked should have been given. There was a total and fatal variance between the proof and the allegations contained in the "first and second counts." Elliott and Smith, use, &c. v. Harralson, 1 Ala. Rep. 74; King et al. v. Griffin, 6 Ala. R. 387; Sawyer v. Patterson, 11 Ala. R. 526.

3. The evidence offered to show that plaintiff in execution, as well as the defendant, had ordered and acquiesced in the stays indorsed on the *fi. fas.* offered and excluded, as also those *fi. fas.* and their indorsements as offered, were admissible. Andress v. Crawford, 11 Ala. R. 853.

4. The sheriff is not liable to the penalty of the statute, for taking fees, on account of services, for which no fees are enumerated in the fee bill. Where he takes fees for such services, he is liable to refund the excess, if he takes too much. Walker v. Ham, 2 N. H. R. 238.

MORGAN, contra.

DARGAN, J.—The act under which this action is brought, provides, that if any officer shall presume to demand, and receive, any other, or higher fees, than are prescribed by this act, he shall be liable in damages, to the party aggrieved, four fold the fees so unlawfully demanded, and received, to be recovered in any court of competent jurisdiction, &c. This act, however, makes no provision for compensation to sheriffs, who by virtue of process, take possession of, and retain in their custody slaves, or other property, that requires sustenance and support. But the act of 1807 (Clay's Dig. 203,) provides, that when any sheriff, or other officer, shall serve any writ of execution on any slaves, horses, or other live stock, and the same shall not be immediately restored to the possession of the debtor, by his giving bond, it shall then be lawful, and such officer shall provide sufficient sustenance for the support of such slaves, or live stock, until they are sold, or otherwise discharged from such execution, and on the return of the execution, the court shall, on motion of the officer, settle, and adjust the compensation he shall be allowed for supporting such slaves, or stock, and the officer shall be allowed to retain the same, out of the proceeds of the sale of said slaves or stock.

The charge of the court subjects the defendant to the penalty of the act of 1843, for retaining compensation for the support of the slaves during the time he had them in his possession, by virtue of the attachment, because he had not moved the court to fix, and settle the amount he was entitled to retain. In this the court erred. It is certainly clear, that this act did not intend to inflict the penalty of four fold on a sheriff for retaining fees for services, that the law allowed him, because the amount of such fees were not ascertained in the manner prescribed by the act of 1807. But the act of 1843, intended to subject a sheriff, or other officer, to the penalty of four fold the amount of fees demanded, and received by him, to which by law he was not entitled, but which he had extorted, illegally, by means of the process in his hands. The act did not intend to inflict the penalty, because the sheriff had not moved the circuit court to settle,

and adjust fees, to which he was entitled, but designed to punish him for extorting illegal fees. We are fully sustained in our conclusion, by the supreme court of New Hampshire, in the case of Walker v. Ham, 2 N. H. R. 238. In that case, the sheriff demanded, and received of the defendant, three dollars, over and above the ordinary fees, on account of extra trouble and expense in executing the writ. The statute of New Hampshire did not prescribe any compensation for such services, nor deny the right of the sheriff to receive it. The court held, that the sheriff was not liable to the statute penalty, for receiving fees for services, for the performance of which, though not enumerated in the fee bill, he was, by the rules of the common law, entitled to reasonable compensation. We acknowledge the propriety and justice of this decision, and think that the rule it establishes, accords with the true intent of our legislature. Our statutes do not undertake to enumerate every act of extraordinary service, for which a sheriff may be entitled to reasonable compensation. They do however prescribe fixed fees for certain enumerated services, and provide a penalty for extorting more for the performance of those services, than is allowed by law; but where a sheriff is entitled to reasonable compensation for services, and this compensation is not fixed, and ascertained by statute law, in advance of the performance of them, a sheriff is not subject to the penalty of the act, for demanding, and receiving reasonable compensation, for the performance of such service.

The true construction of our act, is this: that a sheriff, or other officer, shall be liable to the penalty of the act of 1843, for receiving a larger sum by way of fees, than is allowed by our statutes, for the performance of the duties, or services enumerated in the various acts. But if a sheriff is entitled by law to receive compensation for certain services, but this compensation is not fixed, and ascertained by statute, he does not incur the penalty of the act of 1843, if he receives more than reasonable compensation for such service. But if he has received for the performance of such service, more than reasonable compensation, he is liable to be sued for money had and received by him, who is legally entitled to it.

The judgment must be reversed, and the cause remanded.

HOOKS v. BR. BANK AT MONTGOMERY.

1. P. C. H. executes a deed of trust to M. H. H. for a number of slaves, to protect him from liability as his security on a note held by the bank—some of the slaves are sold by the sheriff under older liens, and M. H. H. purchased them—the remainder are sold, for the purpose of paying said note, by the register, and under a decree in chancery, rendered on a bill filed by M. H. H. against P. C. H. and A. The bank assents that the register's sale may be on a credit, the purchaser giving notes wirh approved security—C. became the purchaser, and gave M., S., C., and S. as securities, to whom M. H. H. and C. executed a deed of trust on all the slaves, as well those sold by the sheriff, as those sold by the register, for their indemnity, and in it, the previous deed from P. C. H. to M. H. H. is recited. The bank afterwards procures an execution in its favor against P. C. H. founded on another and distinct debt, to be levied on the slaves sold by the sheriff, and M. H. H. interposes a claim. Held: 1st. That the chancery proceedings are not evidence against the bank. 2d. That the assent of the bank to a sale by a register on a credit, did not make it a party to the chancery proceedings, nor can it affect its right to subject the slaves levied on, to its execution. 3d. That the recital of the deed from P. C. H. to M. H. H. in the deed from M. H. H. and C. to M., S., C. and S., is not evidence to show title in M. H. H., but that if he relied on his deed from P. C. H. he should have proved not only its execution, but the *consideration thereof*, by legal evidence. 4th. That neither the chancery proceedings, the action of the bank at the register's sale, nor the deed to M., S., C. and S. separately or collectively, could estop the bank from contesting the title of M. H. H. to the slaves in controversy, nor are they evidence to show that the title had passed from P. C. H.

Error to the Circuit Court of Macon. Before the Hon. George W. Stone.

This was a trial of the right of property in certain slaves, levied on under a *fieri facias*, in favor of the defendant in error, against one Peter C. Harris, as the property of said Harris, and claimed by the plaintiff in error. The bill of exceptions found in the record, discloses the following facts. On the 16th day of May, 1842, the said Harris made a deed of trust, the execution of which was only proved on the trial, for a number of slaves, those in controversy included, to the

said claimant, to prosect him as the security of said Harris, on a certain note alleged to be due by him to the said branch bank. On the 5th September, 1842, the slaves in controversy, were sold, by the sheriff of Macon county, by virtue of sundry executions against said Harris, then in his hands, and said claimant became the purchaser: soon after this, one Reuben Anderson caused the remainder of the slaves named in said trust deed, to be levied on under an execution, which he had obtained against said Harris, when said claimant filed his bill in chancery to enjoin him from selling them, and for general relief. On the final hearing, the chancellor decreed in favor of said claimant's lien, and directed a sale of the negroes, for the purpose first, of paying the said note on which plaintiff was security and then the debt due to said Anderson, if any thing was left. On the first day of January, 1844, the said slaves, decreed to be sold, were exposed to sale by the register, the president of said bank being present at the sale, and representing its interests, under the following resolution of the board of directors; "Saturday, 30th Dec. 1843. *Resolved*, that the president be authorized to go to Tuskegee to attend the sale of Peter C. Harris's property, advertised to be sold by order of the chancery court, and that he be authorised to have the property sold on a credit of one and two years, for such notes, as he may approve, bearing interest from date, to the extent of the claim of the bank, and that the president be fully authorized to do any thing in the premises, he may think most for the interest of the bank." Before said sale, the president of the bank was informed of the desire of the claimant, and one Clanton, to purchase said slaves, on the said credit of one and two years, to the extent of the debt due to the bank on said note; to give notes with Lemuel Merrill, George Stone, Joseph L. Cunningham, and Arnold Seale, as securities to said bank, to the amount of their purchase; to secure said Merrill, Stone, Cunningham, and Seale, by a deed of trust on the slaves purchased by said claimant at the previous sheriff's sale, and such as they might purchase at said register's sale, and subject to this last deed of trust, to secure said slaves to the use of the wife and children of said Harris, and said president approved of and concurred in said arrangement. Said Clanton became

the purchaser of the slaves sold by said register, and soon afterwards, he and said claimant executed notes to the bank, payable in one and two years, with the said Merrill, Stone, Cunningham, and Seale, as securities—also the trust deed before referred to, to secure their payment, and subsequently a deed to said claimant in trust for the sole and seperate use of said Harris's wife and children, &c. The court charged the jury, that neither the said chancery proceedings, the action of the said president of the bank, nor the said trust deed to Merrill and others, nor any two or more of them combined, had any influence upon the question of liability, or not, of the property in controversy, to the plaintiffs execution in this case: to this charge the claimant excepted, and the same is now assigned as error

McLester, for plaintiff in error.

Cocke and Belser, for defendant.

1. It was the province of the court to direct the jury as to the effect, not only of the record and written evidence, but also of all extraneous testimony connected therewith. This was all that it did, and in doing this, it committed no error. 10 Mass. 388; 1 Watts, 453; Doe ex dem. Jones v. Fulgham, 2 Murp. 364, *et ubique.*

2. The court properly instructed the jury, that neither the proceedings in chancery, nor the authority delegated by the bank to John Martin, nor his acts and declarations, whilst acting under it at the register's sale, could separately or collectively affect the right of defendant in error to condemn the slaves previously sold by the sheriff as the property of Harris.—1. The defendant was neither party nor privy to the chancery proceedings, and could not be estopped thereby. 2 Smith's Lead. Cas. 477, and cases there cited; Thrasher v. Harris, 2 N. Hamp. 443; Wadsworth v. Marsh, 9 Conn. 481; Birdsall v. Hewlett, 1 Paige, 35; Jackson v. Hoffman, 9 Cow. 271; Bradshaw v. Heath, 13 Wend. 419; Collins v. Loftis, 10 Leigh, 5. 2. If defendant could be regarded as a privy, by reason of constructive or actual notice, its interest in that particular proceeding ceased at the the time of the register's sale, by a settlement of its demands, long before any

question had, or could have arisen, as to the fairness of Hooks's purchase at the sale by the sheriff. 3. The trial of the right of property in this case, involved no question as to the conclusiveness of the decree of the chancellor, so far as the property embraced in that decree is concerned. The rights to the slaves in controversy were not litigated in that proceeding, and consequently were not adjudicated. Davidson et al. v. Shipman, 6 Ala. 27; Ansley v. Pearson, 8 Ala. 431. 4. The authority of John Martin to act in the premises as the agent of the bank, was special, and the parties concerned were bound to know the extent of his authority. Story on Ag. § 72; Wood v. McCain, 7 Ala. 800; Scarborough v. Reynolds, 12 Ala. 252; 7 Johns. 390; 15 ib. 44; 6 Cow. 354; 10 Mass. 397; 26 Wend. 143, 226; 9 Peters, 607; 15 East, 407; 6 Pick. 202; 11 Mass. 29. 5. Any engagement by the agent, beyond a consent to, and an affirmance of, the register's sale, on the prescribed credit, and the taking of notes from the purchasers satisfactorily secured, was unauthorized, and not binding on his principal. Spyker v. Spence, 8 Ala. 333; Br. Bank at Mobile v. Hunt, 8 ib. 883. The general words did not enlarge his authority. Story on Ag. § 62 to 68; 1 Ala. 565; 7 ib. 800; 12 Mass. 237; 1 Pick. 215; 15 ib. 302; 1 Moore & R. 66.

3. If the charge of the court was erroneous, no injury was done thereby to the claimant. By his own case, he shows, that he had no title to the property, and that his claim was improperly interposed. McGrew v. Hart, 1 Port. 175; Frow et al. v. Downman, 11 Ala. 880. It is shown, that the debt to the bank on which Seals, Merrill, Stone and Cunningham were securities, had not been paid, that the law day of the deed of trust given to secure them had passed, and it is also shown, that the deed of trust executed by Hooks and Clanton, to Hooks, trustee of Mrs. Harris, under which the claim was interposed, was not to be operative until the bank debt was paid, and the deed of trust to Seals et als. was discharged. It will be particularly observed, that the slaves involved in the trial of the right of property were never sold by the register, but were sold by the sheriff, at which sale Hooks became the purchaser. The question, then, and the only question, that arose, was, whether the purchase of Hooks at

the sheriff's sale was not colorable and fraudulent. Ansley v. Carloss, 9 Ala. 973. It is shown by the bill of exceptions, that the entire debt due the bank, at the date of the register's sale, including the amount due on the note on which Hooks alone was security, and the bill of exchange on which Hooks and Clanton were securities, amounts to $12,494 42; that the property sold by the register under the deed of trust to Hooks alone, amounted to $9,455; that the property sold on the same day by the register, under the deed of trust to Clanton and Hooks, amounted to $1,900; and that the property previously sold by Hooks, under the deed of trust to himself, amounted to $1,900; which amount he had not applied to the bank debts. These several sales amounted to the sum of $13,255—$760 58 more than the amount of the bank debts: so that the property unsold by the sheriff, added to the fund then in the hands of Hooks, was sufficient to pay the bank debts, and there could therefore be no inducement on the part of the bank to procure Seals and others to become liable. It is not pretended that the property sold above its value at the register's sale. The charge of the court was equivalent to saying to the jury, that admitting the facts relied on by the claimant to be true, they did not amount to a defence. It undertook to pronounce, not on the weight, but on the effect, of the testimony.

COLLIER, C. J.—1. No question is raised upon the record, as to the *bona fides* of the purchase by the claimant or Clanton, of the slaves, embraced by the deed, from Harris to Hooks, which were sold under executions against Harris. But the first inquiry to which our attention is invited, is, whether the proceedings in chancery, set out in the bill of exceptions, tend to establish the legal title of the claimant to the slaves in question? It will be observed that the plaintiff in execution was no party to these proceedings; that the bill was filed by the claimant, to injoin Reuben Anderson for selling under a judgment in his favor, the slaves conveyed to the complainant, and which had not been sold under the executions referred to, and for general relief. The cross bill by Anderson alleged that one of the debts professed to be secured by the deed was simulated; insisted that for that cause,

the deed should be declared void *in toto*, and asked such relief as might be appropriate. Upon the case made by both bills, it was adjudged that the deed should be inoperative as to the debt which was objected to as merely pretended; but in respect to the debt, for the payment of which the claimant was a surety, it was held to be entitled to priority over the judgment and execution in favor of Anderson; the slaves were ordered to be sold, and the proceeds appropriated accordingly.

This decree merely adjusted the priority of the parties to the suit, and established the validity of the deed of Harris to Hooks, so far as it provided for the debt, for which Hooks was a surety. True, that deed proposed to furnish an indemnity to Hooks, against the consequences of his suretyship for a debt due the plaintiff in execution by Harris; but it did not confer on the plaintiff a benefit, or give to the bank any control over the mortgaged property. It was, then, a security, which the mortgagee held independently of the plaintiff; and the latter cannot, therefore, be said to be in privity with him, so as to make a decree in a cause to which the mortgagee was a party evidence against the bank. The proceeding in chancery not being what is technically called *in rem*, and the plaintiff not being directly nor indirectly, a party to it, the decree is not conclusive against the plaintiff as to any point adjudged by it. The Branch Bank at Montgomery v. Hodges, 12 Ala. R. 118; McLelland v. Ridgeway, ib. 482. It is not only not conclusive, but it is not evidence in an independent and disconnected cause against a stranger to it.

2. The assent of the plaintiff, that the register might sell the slaves under the decree on a credit of one and two years, did not make the plaintiff a party to the proceeding. It does not appear that it in any manner interfered, or was even aware of the chancery suit until the final decree was rendered. We must intend then, that the interference of the plaintiff was induced by the claimant, and was intended for his benefit, by enabling him to realize a larger sum from a credit than a cash sale would produce, with the interest added. The acquiescence by the bank, in the sale by the register, might perhaps conclude it as against a purchaser, and prevent the sale under execution of the same property, to pay another debt due the bank by Harris. But it must be remembered that the

property now in controversy, was not sold under the decree; it had been levied on, and sold previous to the exhibition of the bill, under writs of *fieri facias*, against Harris, which operated a lien paramount to the deed. The assent then of the bank to the credit sale of the register, cannot affect its right to subject to execution, property upon which the decree did not operate, though it was embraced by the deed.

3. The deed by Hooks and Clanton, of May 1844, by which they mortgaged to Cunningham and others, their sureties for the amount of Harris's indebtedness to the plaintiff in execution, the slaves embraced by the deed of Harris to Hooks, does not tend to establish a legal title in the claimant, which cannot be reached by the plaintiff's execution. True it indicates an assertion of right by the claimant and his co-mortgagors; but this is nothing more than a written declaration of the recitals of the mortgage, and in itself proves nothing against one who asserts an antagonistic claim. This propotition seems to us too clear to require the aid of argument to support it.

Neither the proceedings in chancery, the agency of the plaintiff in execution in respect to the property sold by the register, or the mortgage of 1844, severally or collectively, show a title in the claimant inconsistent with the evidence of ownership by the defendant in execution. They do not estop the plaintiff from controverting the claimant's title; nor are they evidence against the plaintiff in the present case, to show that the right to the slaves had passed from the defendant in execution and vested in the claimant. If the claimant relied upon the deed from Harris to himself, he should have proved its execution by legal testimony, and have shown *prima facie*, that, it was sustained by a sufficient consideration. The admissions in the record of the suit in chancery are insufficient for that purpose (as we have seen) in the case before us; and the interference of the plaintiff at the register's sale, and the mortgage of 1844, do not tend to establish either of these facts.

True, the act of 1812 declares, that in trials of the right of property, under the statute, the burthen of sustaining the issue should be on the plaintiff in execution; but the effect of evidence adduced by the plaintiff can only be met and over-

come by such proof as is admissible according to legal rules. We have considered the question presented for revision, and have but to add that the judgment of the circuit court is affirmed.

CHILTON, J. not sitting.

BANK OF THE STATE OF ALABAMA v. GODDEN AND LOWRY.

1. A judgment creditor is not bound to active diligence to enable him to hold a security liable, and it is no defence for a surety, that the sheriff returned the property levied on to the principal debtor, who soon after became insolvent.

Error to the 22d Chancery District, before the Hon. W. W. Mason, Chancellor.

P. & J. L. MARTIN, for plaintiff in error.
JOHN and DAVIS, contra.

CHILTON, J.—The question presented in this case for revision, is, whether the defendants in error, as the sureties of Fletcher, are discharged from liability upon a judgment rendered against them and their principal, by the act of the sheriff in levying the execution upon a slave of the principal, and afterwards returning said slave to him, and the delay of the bank to issue another execution until after the principal had become wholly insolvent.

The principles of law which govern the case are well settled, and their statement will show at once that the chancellor's decree cannot be sustained.

1. The creditor who has obtained his judgment, is not bound to active diligence so as to enable him to hold the security liable. He may delay as long as he pleases. 8 Ala.

Rep. 903. And although he stipulates with the principal debtor for delay, yet if the agreement be merely voluntary, the surety is not discharged. 6 Ala. Rep. 57. In short, no agreement will have the effect to exonerate the surety which is not bound on a valuable consideration, and does not disable the creditor from proceeding to collect the demand. 2 Stew. 63; 4 Por. 61; 8 Ala. Rep. 750; 4 Har. & McH. 41.

In Sawyer's adm'r. v. Patterson, 6 Ala. Rep. 573, the execution creditor in consideration of receiving half the debt, directed the sheriff to delay the execution, and the levy on property sufficient to have paid the whole debt was discharged. The principal becoming insolvent, the surety insisted on these facts as a discharge—Held, that he was liable. That case is a much stronger one than this; for there, the delay and discharge of the levy was by the plaintiff's act. But the agreement to delay was not binding, for want of a valuable consideration. In this case, the plaintiff is merely passive.

2. The levy upon the slave John, and his subsequent restoration by the sheriff to the principal debtor, does not discharge the debt. Had the sheriff levied upon property sufficient in value to have satisfied the execution, and retained it or wasted it, this would amount to a satisfaction. Such is not the case here. It would be strange indeed if an unauthorized arrangement between the sheriff and principal debtor, to which the plaintiff was in no wise consenting, by which a levy is to be indorsed, and the property is to remain with the debtor, should have the effect to deprive the party plaintiff of his right to satisfaction by another execution. It is not pretended that this levy amounts to a satisfaction, so far as Fletcher is concerned; upon what principle, then, can his sureties claim that they are released by it? We have seen that mere delay, or want of diligence on the part of the bank, will not discharge them; and there has been no period since the judgment was rendered, when the plaintiff in the judgment could not have proceeded to its collection. If greater diligence was needed for the sureties protection, they should have paid the debt and taken the matter in their own hands. In cases where there has been no satisfaction of the debt, or that which the law regards as a satisfaction, the *laches* of the

sheriff shall not work a forfeiture of the debt to the plaintiff as against the other defendants to the judgment who were securities upon the note. The cases of Abercrombie v. Knox & Snodgrass, 3 Ala. Rep. 728, and Wilson v. Bank of Orleans, 9 ib. 847, are conclusive to show, that the plaintiff has not lost its remedy against the sureties by delay. The case of the Bank v. Curry, 13 Ala. Rep. 304, and the cases found in 4 Ala. 543; ib. 427; 9 Por. 201, and 8 Ala. 759, may suffice to show, that the plaintiff has not lost the right to have satisfaction of the judgment by the *laches* of the sheriff, as shown by the proof in this cause.

Let the decree of the chancellor be reversed, and a decree here rendered dismissing the bill, at the cost of the defendants in error.

CLIFTON ET AL. V. SHARPE, USE, &C.

1. The transferror of a *chose in action*, is an incompetent witness to establish the claim.

Error to the County Court of Fayette. Before the Hon. B. W. Wilson, Judge.

THIS was an action by defendant in error, for the use of Alfred Battle, guardian of the orphans of Elias Fort, deceased, against the plaintiffs in error, on a bill single. In the course of the trial, as appears by a bill of exceptions, the plaintiff below offered as a witness Elias Fort, one of the orphans of Elias Fort, deceased, who being examined on his *voir dire*, stated, that when he made a final settlement with Battle, his guardian, he received from him, among other claims, the paper sued on, and that he was still to have a share in the claims when collected. He was objected to by the opposite party, as an incompetent witness, and thereupon, to remove the objection, executed to his mother, a full release and trans-

fer of his right, title and interest in the claim in suit, which he delivered to the attorney in fact of his mother, &c. The objection to his competency being still insisted upon, notwithstanding this release and transfer, the court overruled it, and the defendant below excepted, and now assigns it as error.

W. R. Smith, for plaintiffs in error.

DARGAN, J.—This case, falls directly within the principle, of the case of Houston v. Prewett, 8 Ala. 846. In that case, it was held, that a witness who was the real plaintiff, though not a party to the record, could not transfer his interest in the suit, so as to render himself competent. See also Bell v. Smith, 5 Barn. & Cres. 188. Here, although the suit is in the name of Sharpe, for the use of Battle, it was shown, that the bond was in fact the property of Elias Fort, the witness, and that he put it in suit; and in order to render himself a competent witness, transfers his interest to his mother, at the time of the trial, and was then admitted to testify. The decisions we have referred to, forbid that he should testify on the grounds of public policy. We do not see clearly, what influence his testimony ought to have had, but as it was illegal to admit it, the judgment must be reversed, and the cause remanded.

Collier, C. J., not sitting.

Doe ex dem. NICKLES v. HASKINS.

1. When title by prescription is not complete, when the law is changed, altering the period, the past time is effaced, and the substituted law determines the time, which bars a recovery.
2. A bond for title to land, though coupled with the possession, is but an equitable title, and cannot be set up as a bar to a recovery in ejectment.

3. When land has been sold under execution, a deed by the defendant in execution, to his vendee, holding his bond for title for the land, *made after the sale under execution*, will not prevail against the purchaser at the sheriff's sale, who has had the legal title of the defendant conveyed to him by the sheriff.

Error to the Circuit Court of Randolph. Before the Hon. Nathan Cook.

This was an action of ejectment, instituted by plaintiff against defendant in error. On the trial, the plaintiff gave in evidence a judgment, rendered on the 3d October, 1837, in favor of Nickles, Poor & Hall, for $810, against Peter Dudley and one Brinson: an execution issued thereon: proved a sale of the land in controversy, by the sheriff, under it, and the sheriff's deed, dated 7th Sept., 1840. He also introduced a patent from the United States for the land to said Dudley and E. Henry, dated 18th Sept. 1843.

The defendant proved, and read in evidence, a bond for title, executed to him by Joseph F. Henry, Peter Dudley, and William C. Morgan, dated the 25th October, 1836, and proved the payment by him of the purchase money for the land, and his possession under said bond, from its date, and a deed from Henry and Dudley, dated 1st December, 1846; and proved that he gave notice on the day of the sheriff's sale, of his claim and title to the land, in the presence of the plaintiff. The court charged the jury, 1st. That if the defendant had been in quiet possession of said land since the date of the bond, his possession, coupled with said bond, was sufficient to defeat the title of the plaintiff in this action, and they must find for the defendant. 2d. That if the deed, as shewn, was executed in pursuance of the bond, the defendant had a right to recover.

To these charges the plaintiff excepted, and now assigns them as error.

Morris, for plaintiff in error.

1. The plaintiff made out a legal title. The bond for title cannot be read to defeat the recovery at law. Chapman v. Glassel, 13 Ala. R. 50; Jackson v. Pierce, 2 Johns. 226; Smith v. Allen, 1 Blaf'd. 22. 2. The first charge of the

court is error, because it declares an equity a good defence against the legal title. 3. The second charge is incorrect, because it asserts that the possession, coupled with the bond, (which is nothing more than an equity,) overrides the plaintiff's lien, by reason of the subsequent execution of the deed.

No counsel for defendant.

COLLIER, C. J.—1. The first charge to the jury was doubtless induced by the supposition that more than ten years having elapsed previous to the institution of the suit, after the execution of the bond to convey title and the defendant's possession under it commenced, the act of February, 1843, operated a bar to a recovery. The second section of that statute is as follows: "All actions for recovery of lands, tenements, or hereditaments in this State, shall be brought within ten years after the accrual of the cause of action, and not after: *Provided*, that five years be allowed under both sections of this act, for infants, *femes covert*, insane persons, and lunatics, after the termination of their disabilities to bring suits." By the *proviso* to the first section, it is declared, "that no suit shall be barred by the operation of this act, within five years from its passage." Clay's Dig. 329, § 92, 93.

In Henry and wife et al. v. Thorpe et al., 14 Ala. Rep. 103, we considered the act referred to, in connection with the pre-existing enactments, and said, that the weight of authority maintains, "that it is competent for the legislature to modify the terms of prescription at pleasure, and where the prescription has not been completed when the law was changed, the past shall be effaced, and the substituted law shall determine the time that bars a recovery." It was added, that upon any change of the law in this respect, it was allowable "to make such special provisions as are deemed expedient, but if a contrary intention is not manifested, the entire term prescribed by the new law, must elapse after it takes effect, before the prescription is complete."

It is unnecessary to consider whether the *proviso* to the first section will not apply to the second also: for however this may be, not even five years from the passage of the sta-

tute had elapsed before the present suit was commenced, and it is therefore clear that it could not be invoked as a bar to the action.

The bond, at most, could only invest the defendant with a mere equitable title, which a court of chancery would perfect, by enforcing a specific execution of the contract, and such title cannot be set up as a bar to a recovery in ejectment. Chapman v. Glassell, 13 Ala. Rep. 50; Agricultural Bank v. Rice, 4 How. Rep. U. S. 225; Ridgeley's lessee v. Britton, 4 H. & McH. Rep. 507; Mathews v. Ward, 10 G. & Johns. Rep. 443.

2. The second charge assumes, that if the deed was executed in pursuance of the bond, that the defence was complete. We have seen, that the bond, and possession under it, cannot avail the defendant, at law, and the question is, whether the deed, which, in form, professes to convey all the title of the defendant, can prevail against the purchaser at the sheriff's sale. There can be no question that the reason of the law which inhibits the sale of land in the adverse possession of another person, who claims a title, does not apply to sales made under the authority of the law; consequently, it has been often held that land in such a condition may be sold under execution, and all the title of the defendant in execution passes to the purchaser. 4 Kent's Com. 4th ed. 347, n. 4; Kelly v. Morgan, 3 Yerg. Rep. 437; Frizzle v. Veitch, 1 Dana's Rep. 211; Violett v. Violett, 2 ib. 324. The reason of the rule which exempts from levy and sale, personal property in the possession of a third person, under a *bona fide* claim of property, is alike inapplicable. Weir v. Davis & Humphries, 4 Ala. Rep. 442; Horton v. Smith, 8 ib. 73.

The defendant in execution, at the time the land in question was sold, had not executed a deed pursuant to his bond, and consequently had a legal title which might be sold and conveyed by the sheriff. Clay's Dig. 205, § 16, 17; 350, § 31. By such a sale in this case, the lessor of the plaintiff was invested with all the title of the defendant in execution. Upon this assumption, which is but a sequence from the law as we have stated it, we think it must follow that the defendant's vendor was incapacitated from performing his contract by making an operative conveyance as against the plaintiff

in execution; and that the deed, though intended as the fulfilment of the condition of his bond, was wholly ineffectual as against the purchaser at the sheriff's sale. The premises we have laid down are well supported, and the conclusion seems to us to be the obvious result. The judgment is therefore reversed, and the cause remanded. If, however, the defendant has equitable rights, a court of chancery can protect them, and perfect his title.

CARLISLE v. HUNLEY, Ex'x.

1. Where a party desires to impeach the credit of a witness, by proof of statements out of court in conflict with his testimony, he must first lay the predicate, by directing the attention of the witness to the time, place, and person, involved in the supposed contradiction.
2. Where illegal testimony has been admitted by the court, nothing short of a direct, and unequivocal charge to the jury, that they must disregard the illegal proof, can cure the error of its admission.

Error to the Circuit Court of Perry. Before the Hon. John Bragg.

This was an action of detinue, for the recovery of a slave, and was instituted by plaintiff in error, against one William Hunley, who died pending the action, and of whose estate defendant in error is administratrix. The bill of exceptions states, that the defendant offered evidence, tending to prove, that the slave in controversy, was not the property of the plaintiff, but of one Robert Carlisle, who had authorized one Henry Horn to sell him to defendant. To rebut this proof, the plaintiff introduced the said Robert Carlisle, as a witness to prove that the slave was the property of the plaintiff, and that he had never authorized Horn to sell him. On the cross examination of this witness, he was asked by defendant's counsel, "if he had never told Mr. Shaffer, that he had authorized said Horn to sell said slave?" To which the wit-

ness answered, "that he never had so told him." Mr. Shaffer was then introduced, and asked by the counsel of defendant, if the witness Carlisle had not so told him; the plaintiff objected to the witness answering the question, but the court overruled the objection, and the witness answered the question in the affirmative.

The plaintiff's counsel asked the court to charge the jury, that the testimony of Carlisle should be considered by them as uncontradicted, the evidence of Shaffer having been permitted improperly to go to the jury: the court in reply, stated to the jury, that they might take the testimony of the witness Carlisle for whatever it was worth, unaffected by the testimony of the witness Shaffer. To the above ruling of the court, and to its charge to the jury, the plaintiff excepted, and now assigns them as error.

Garrott, for plaintiff in error.

It is clear, that the court erred in permitting the witness Carlisle to be contradicted in the manner shown by the bill of exceptions. The question asked this witness by defendant's counsel, was as follows: "The defendant, in cross-examining said witness, asked him if he had never told *Mr.* Shaffer that he had authorized said Horn to sell said slave." Neither time, nor place, is stated in this question, for the purpose of enabling the witness to re-call to his mind the circumstances under which this statement was made. Even the particular person is designated in no other way than as *Bur.* Shaffer—no christian name is given. "The defendant then called *a Mr.* Shaffer as a witness, and by his attorney asked him, if said witness Carlisle had not told him that he (Carlisle) had authorized said Horn to sell said slave." Against the objection of the plaintiff, the court allowed the question to be answered; "and said Shaffer then testified that said Carlisle last [had] told him that he (Carlisle) had authorized said Horn to sell said slave." That this was wrong, see the following authorities: 1 Greenl. Ev. 514, 515, note 1; 1 Phil. Ev. 294; 1 Ala. R. 65, (73.)

2. On the last point, plaintiff in error relies on the following authorities: "When error has been committed, it must appear, beyond reasonable doubt, that no injury has resulted

from the error to prevent reversal." Haggerty v. Bradford, 9 Ala. R. 567, (571); Pinkston and wife v. Green and wife, ib. 19. As to the impropriety of admitting illegal evidence, and then excluding it, in any case, see 12 Ala. R. 823.

A. B. Moore, contra.—1. The question propounded to the witness on cross-examination, as shown in the record, was sufficient to lay a predicate to contradict said witness.

2. When the object of the defendant is to contradict the statements of plainiff's witness, it is sufficient, on the cross-examination of such witness, to call his attention to the statement intended to be contradicted, and to the person to whom such statement is alleged to have been made. See 1 Phil. Ev. 294; 1 Starkie, 145; 3 ib. 1753; 1 Greenleaf, 1 note, 514; Crowly v. Page, 7 Car. & Payne, 739.

3. But if the court erred in admitting the testimony of Shaffer, to contradict the statement of plaintiff's witness, the error was caused by the subsequent charge of the court, given at the instance of plaintiff, and assented to by defendant.

CHILTON, J.—If a party desires to impeach the credit of a witness, by proof that he has made verbal statements out of court, contrary to what he has testified upon the trial, to avoid surprise, and to afford him the opportunity of explanation, he should be asked as to the time, place, and person involved in the supposed contradiction. 1 Greenl. Ev. 415; Queen's Case, 2 Bro. & Bingham, 313; 1 Ala. Rep. 65; 13 ib. 303. This was not done in the case before us, and consequently, the court erred in permitting the witness, Shaffer, to controvert what Carlisle had sworn.

The subsequent instruction of the court, "that the jury *might* consider the testimony of Carlisle for what it was worth, and as unaffected by Shaffer's testimony, did not cure the error, in admitting Shaffer to testify as to the statements of Carlisle, which conflicted with his evidence. Every one, familiar with the practice, knows how difficult it is to eradicate from the mind of a jury an injurious impression thus created, (McCurry v. Hooper, 13 Ala. Rep. 823,) by permitting illegal proof to be submitted to them, and in such case,

nothing short of a direct and unequivocal charge to them, to disregard the illegal proof, would be likely to erase the impression. In the case before us, the charge of the court was, that they might disregard the illegal proof; thus giving them a discretion as to whether they should do so or not, whereas the law makes it peremptory upon them to lose sight of it. The court having failed so to instruct them, as to render the first error harmless, the judgment must be reversed, and the cause remanded. See Ames v. Schuesler and Donnell, 14 Ala. Rep. 600.

FINN AND DULANEY v. BARCLAY ET AL.

1. A promise by the maker, to pay a note founded on a gaming consideration, to the holder, *after* he had acquired it, with knowledge of its illegality, will not enable him to recover upon it, although after such promise, the holder released a debt due from another person to him, to secure which he had previously received the note.
2. The maker of a note, given upon a gaming consideration, is entitled to be relieved in chancery against its payment, without offering to return the money, or other thing, received when the note was executed.

Error to the Chancery Court of Talladega. Before the Hon. D. G. Ligon, Chancellor.

THE bill in this case, filed by the plaintiffs in error, alleges that on the 23d September, 1844, they executed a note to Joseph N. Savery, one of the defendants, for $160, payable on the 4th day of March, 1845, provided James K. Polk, of Tennessee, should be elected to the presidency of the United States previous to that date, &c: that Finn was the principal, and Dulaney his security, in said note, and that at the time said note was given, Savery sold said Finn a horse worth $80, for which said Finn gave the note of $160, subject to the above recited condition. The bill charges, that

the transaction was intended between the parties as a wager on the presidential election of 1844: that suit was instituted on said note after its maturity in the name of Savery, for the use of Hugh G. Barclay, and that judgment has been rendered on said note against the plaintiff by default, upon which execution has issued, and been levied on property of Dulaney, &c. Savery and Barclay are made parties defendant to the bill, and a perpetual injunction of the judgment is prayed.

The defendants answered the bill separately. Savery admits all the allegations, and avers the transfer of the note by him to one Rice by delivery, for value received, and the promise of plaintiffs to said Rice, after the transfer, to pay him said note. Barclay disclaims all knowledge of the consideration of said note, and of the circumstances under which it was given, and avers, that some time after the presidential election was over, the note was offered for sale to him by the holder, but that he declined having any thing to do with it, until he saw the plaintiffs, who informed him that they would make no defence to the note, but would pay it, and that he thereupon took the note from said Rice, as collateral security for a note due him by Rice. He further avers, that after the rendition of the judgment, and issuance of execution thereon, he granted indulgence to plaintiffs on their solicitation and assurance, that they would pay the debt, and that relying on these assurances, he then gave up his note to said Rice, and took said judgment as absolute payment of the debt due him by Rice.

The facts stated in the bill and answers are substantially made out by the proofs.

The chancellor dismissed the bill, which is now assigned as error.

L. E. Parsons and J. T. Morgan, for plaintiffs in error.

1. "Where an instrument is absolutely void in its creation, it cannot be made valid by any subsequent transaction immediately arising out of it." Woodson et al. v. Barrett & Co. 2 Hen. & Mun. 88; Ivey v. Nicks, 14 Ala. 564; Givens v. Rogers, 11 ib. 543; ib. 656; 10 ib. 316; Manning v. Manning, 8 Ala. R. 138; Saltmarsh v. Tuthill, 13 ib. 390.

"The circulation of gaming bonds is an evil no less to be discountenanced, than the giving of them. And no means are more likely to prevent the giving of them, than to put an effectual stop to their circulation." Woodson et al. v. Barrett & Co. 2 H. & M. 88.

2. Barclay entered into this transaction with a full knowledge of the fact that the note was void, because it was in violation of the laws of the land. How can he be called an innocent holder? Barclay gave value for it, with this knowledge. So did Savery give value, in part, viz., his horse, yet he cannot enforce it. Wherein is Barclay entitled to the aid of a court of equity, if Savery is not?

S. F. Rice, contra.

1. The defence of gaming consideration is intended as a shield, not as a sword.

2. If a judgment by default, founded on a note void for gaming consideration, "be purchased on the faith of a promise, by the maker, to pay it, he will be compelled to pay the assignee at all events, on the ground of a contract, of which the purchase of the judgment would be a sufficient consideration." Clements v. Loggins, 2 Ala. Rep. 514; Manning v. Manning, 8 Ala. Rep. 144.

3. If, after a judgment is thus purchased, on the faith of the defendant's promise, the defendant becomes the actor in a court of equity, and asks that court to lend him its aid to defraud and despoil the purchaser of the judgment, by a perpetual injunction, such a prayer cannot be granted—especially, under such circumstances as are disclosed in this case. In equity and conscience, such defendant is bound to pay the judgment to the purchaser; and to aid him in the relief he seeks, "would be to become accessory to the commission by him of a fraud." Reynolds v. Dothard, 11 Ala. R. 534.

4. The complainants in this case, do not merely ask the court to relieve them from a judgment founded on a gaming consideration. They ask a great deal more—that the court will protect them in the enjoyment of the horse obtained from Savery, and help them to entail as a loss upon Barclay, the full price which he paid for the judgment, upon the faith of their promise.

5. In such a case as this, "a knowledge of the whole transaction by the party (Barclay) to whom the new promise was made, will not vary the case;" because, upon the faith of complainant's admissions, that they would waive all their defence and pay, Barclay changed his condition, and parted with his property. Such admissions are always held as conclusive, and as matter of estoppel, because they have been "acted upon." Fenno v. Sayre, Converse & Co. 3 Ala. R. 474, and the cases there cited from the Kentucky Reports, and approved by this court; 1 Greenl. Ev. § 27.

6. The decisions relied on for plaintiffs in error, are decisions in the courts of law, or in cases where no new contract or consideration existed—where no admissions had been acted upon by a third person, &c. These decisions do not apply to this cause, which is in a court of equity, and in which the parties setting up the defence of gaming, have been guilty of bad faith, and are the actors.

DARGAN, J.—A note, or other security, given on a gaiming consideration, is void under our statute, even in the hands of a *bona fide* holder, Manning v. Manning, 8 Ala. 138. The note on which the judgment was rendered, was void in the hands of the payee, and equally so when it came to the hands of Barclay. But it is contended, that Barclay should be protected, for the reason, that after he had received it from Rice, as collateral security, to secure a debt due from Rice to him, the makers promised him that they would pay it, and would not take advantage of the illegality of the consideration, and in consequence of this promise, he had released the debt, due by Rice to him, to secure which, he had previously received the note.

If the maker of the note, induce one to purchase it of the payee, and he who was induced to part with his money, or property, in payment of the note, was ignorant of the consideration, the maker is estopped from alleging against the purchaser, that the note was founded on a gaming consideration. Benerly v. Smith, 1 Wash. 297; 8 Ala. Rep. 138.

This is not, however, the condition of Barclay. The note showed on its face that it was given on a gaming consideration. He acquired it as a collateral security from Rice, who

had obtained it from Savery. Neither Rice nor Barclay, had been induced to take the note by the makers; nor did they part with any thing valuable for the note, at their request.

But after Barclay had obtained the note as collateral security, the makers promised payment. Barclay says, that relying on this promise, he released to Rice, the debt to secure which the note was received. It does not appear, however, that the makers of the note even knew upon what consideration Barclay obtained the note, nor did they request him to release, or give up any right he had on Rice. But the release of the debt from Rice, was a mere voluntary act, without any request of the makers. Barclay is not, therefore, a *bona fide* holder, nor has he departed with any right at the request of the makers. He stands, therefore, in the same situation that Savery, the payee, occupies, and can claim no further protection from the same, than the payee could.

The note was given for a horse, worth eighty dollars, conditioned to be paid when James K. Polk should be elected president of the United States; the amount of the note being one hundred and sixty dollars. It is clear from the record, that the whole transaction was a mere wager, on the presidential election, and the security given, void. Givens v. Rogers, 11 Ala. Rep. 543; ib. 656. But as the parties permitted judgment to go against them at law, and never filed their bill to obtain an injunction, but do not offer to return the horse, or to account for his value, the question is, ought a court of equity to interfere, and afford relief. It is very clear, that a court of equity acting upon the general rules that govern in such cases, would not interfere at all after a judgment at law, unless the defendant was prevented from making his defence, without negligence, or fault on his part. And if he applied to equity for relief, before judgment had been obtained, he would be required, before he received relief from the chancellor, to do equity, and therefore his bill should contain an offer on his part, to do what the chancellor should adjudge equitable. It is this offer of the complainant, that gives the court the authority to decree against the complainant, the amount actually and in good conscience due; and therefore this court will not interfere in his behalf, unless the complainant will, by his bill, enable the court to do complete justice. Branch Bank at Mobile v. Strother, at this term.

The bill, however, in this case, contains no offer to return the horse, nor to pay his value; and if it can be sustained at all, it must be by our statute, that declares all gaming contracts void, and gives jurisdiction to our courts of chancery, so far as to sustain bills of discovery, and to enjoin judgments at law, founded on gaming securities.

The act of 1807, Clay's Dig. 257, declares all promises, agreements, notes, bills, bonds, or other contracts, judgments, mortgages, and other securities, where the whole, or any part of the consideration thereof shall be founded on a gaming consideration, to be utterly null and void. See Givens v. Rogers et al. 11 Ala. 543; Trammel & McCarty v. Gordon, 11 ib. 656; 8 ib. 138. By the act of 1812, Clay's Dig. 350, it is enacted, "that courts of equity shall have jurisdiction of all cases of gambling consideration, so far as to sustain bills of discovery, and to enjoin judgments at law. Under this last act, a court of equity is bound to entertain a bill, seeking to enjoin a judgment at law, which has been rendered on a security given for a gaming consideration, although the complainant could have defended himself at law, but did not do so. Manning v. Manning, 8 Ala. 138; Cheatham v. Young, 5 ib. 353; Fenno v. Sayre & Converse, 3 ib. 458. Being bound then to take jurisdiction, because the judgment is founded on a gaming consideration, how far are we bound to afford relief by the statute of 1807, when the complainants do not offer to do equity? This act declares void, all contracts, of whatever kind, or nature, where the whole, or any part, is founded on a gaming consideration. Being compelled by the act of 1812, to take cognizance of the bill, we are compelled to declare the contract, and the judgment thereon rendered, null and void; and we cannot decline to take jurisdiction, because the complainants do not offer to restore the horse received from Savery, the title to which he has never legally parted with. We must therefore reverse the decree of the chancellor, and here render the decree he should have rendered, on the bill, answer and proof, perpetually enjoining the judgment at law. It is further ordered, and decreed, that the defendants in error pay the cost of this court, and also the cost of the court below.

LINCH, USE, &c. v. McLEMORE, ADM'R, &c.

1. The certificate of a judge to the exemplification of a record of another State, that the attestation of the clerk "is in due form," is sufficient to admit such exemplification in evidence, notwithstanding the judge may not certify, *in so many words*, to the official character of the clerk.
2. Where a claim against the estate of S. F., is contested by his administrator, a judgment against S. F. sen. and S. F. jun., in favor of the plaintiffs, is sufficient to establish the claim, unless a doubt is created, by proof adduced on the part of the administrator, as to the identity of the demand with either of the defendants to the judgment.

Error to the Orphans' Court of Montgomery. Before the Hon. Adam C. Felder, Judge.

THIS was an issue, made up in the orphans' court, on a demand presented and sworn to, as the statute requires, by plaintiff against the estate of Simeon Fuller, of which defendant was administrator, and which had been declared insolvent. The plaintiff, as proof of his demand, relied on a judgment, rendered in the superior court of Putnam county, in the state of Georgia, against Simeon Fuller, sen., Simeon Fuller, jun., and one Gabriel Harrison, and introduced an exemplification of the judgment, to which there appears a certificate of the judge, certifying, that the clerk, whose name is attached to the preceding certificate, " is clerk of said court, and that his attestation as such is in due form, and full faith should be given to it as such."

There was no evidence as to whether the deceased was Simeon Fuller, sen., or Simeon Fuller, jun. The court rejected the exemplification, and judgment was rendered for the defendant. This action of the court is now assigned as error.

MAYS, for plaintiff in error.

The record from Georgia was authenticated according to the act of Congress. See Clay's Digest, 619; 13 Ala. 727; 2 ib. 310: 8 Porter, 303; 3 Ala. 401, and 529; 1 Stewart, 543; 1 Stew. & Por. 49; 7 Port. 110.

"Junior" or "Senior," is no part of a man's name, but only descriptive of the person. See 15 Pickering, 7, 9; 10 Mass. 203, 205; 1 Pick. 388; 7 Johns. 549; 6 Verm. 9; 3 Miss. 59; 12 Vermont, 39, 611; 9 Shephard, 171; 4 Monroe, 526; 3 Pike, 505.

If the defendant was sued by the wrong name, he should have objected by plea in abatement.

YANCEY, for defendant.

COLLIER, C. J.—There can be no doubt but the act of 1790, prescribes the mode in which the proceedings and judgment in a court of record of a sister state, shall be authenticated, so as to entitle it to be received as evidence in the courts of any other state. This is conclusively shown by a comparison of the language of that statute, with the terms employed in the supplementary enactment of 1804, as well as the uniform practice and decisions of the courts of the different states, whenever a question has been raised.

The exemplification from the superior court of Georgia is regularly authenticated; although the judge does not certify, *in totidem verbis*, to the official character of the clerk, he affirms that his attestation is *in due form*, and this is all that is required; these terms are sufficiently expansive in their import, to embrace every thing that is material. Brown v. Adair, 1 Stew. & Port. Rep. 49, upon this point, has been followed as a correct exposition of the law.

In respect to the objection that two of the defendants to the judgment in Georgia are of the same name, but distinguished in the proceedings there as *junior* and *senior;* and it was not shown to the orphans' court, whether either, and which one of their estates was administered on by the defendant; it is enough to say that it was not incumbent on the plaintiff to have adduced evidence, in the first instance, that the judgment debtor and intestate, were the same person. True, proof showing this to be doubtful, might devolve upon the plaintiff the necessity of establishing their identity; but until their identity is made doubtful, the plaintiff may rely upon his exemplification—verifying, if required, the justness

of his demand, as the statute directs. See Givens et al. v. Tidmore, 8 Ala. Rep. 745. The judgment of the orphans' court is reversed, and the cause remanded.

GRAHAM ET ALS. V. TANKERSLEY.

1. Where a non-resident vendor of land is unable to make title, an avermont, in a bill, filed by the vendee, that the vendor "is in very slender circumstances," and unable to respond in damages on her covenant of warranty, is sufficient to authorise the vendee to come into equity, to enjoin the collection of the purchase money.
2. A vendor of land, unless notified of the pendency of a suit, against the vendor for its recovery, and required to defend it, is not concluded by a judgment of eviction therein.
3. Notice to an agent, appointed by the vendor of land, to receive and collect a note, executed for the purchase money, of the pendency of a suit, by a third person, against the vendee for the recovery of the land, is not notice to the vendor.
4. A plaintiff in a cross bill is not allowed to contradict his answer to the original bill: if he has made a mistake as to the facts in his answer, the only mode of correcting it, is by application to the court for leave to amend it, or to file a supplemental answer, and not by the exhibition of a cross bill.
5. It is not error in the chancellor to refuse to decree upon proof, which is not responsive to any of the allegations in the pleadings.

Error to the 3d Chancery District, before the Hon. Anderson Crenshaw, Chancellor.

In this case, the bill was filed by defendant against plaintiff in error, and alleges, that on the18th day of May, 1836, he purchased of Susanna McNeill, then of Sumter county, in this state, but now of Newton county, Mississippi, the east half of the south east quarter, and fraction C of section twenty, township nineteen, and range two, west, in the district of land subject to sale at Demopolis, at the price of $3,900, for which he gave his two notes of equal amounts, payable at

one and two years, and received from her a deed in *fee simple*: that at the time of the purchase, he supposed the said Susanna had a good right to the land: that both she and Alexander Graham, her brother, who acted as her agent in the negotiation and sale of the land, so represented at the time, although no patent to it had issued, and that in confirmation of the representations made, said Alexander exhibited to him the receiver's certificate to said Susanna for the same: that at this time he had no knowledge or suspicion of an adverse claim to it: that before the last note fell due, he was, for the first time, notified by one Daniel Green, now deceased, that he was claiming said fraction C, and insisting that the patent for it should issue to him, and that he therefore notified Alexander Graham, who was still acting as the agent of said Susanna, of the fact, and received from him the assurance that Green's claim was unfounded, and the said Susanna's was good and indisputable: that in the sale of the land said fraction C was computed at fifty acres, and the price was thirty dollars per acre: that he paid the first note, but refused to pay the second, when it fell due, to the extent of the price to be given for said fraction C, until said Susanna should complete her title to the same: that said Alexander, upon such refusal, again assured him that Green's claim was unfounded, and said Susanna's right unquestionable; and that confiding in his assurances, both as an individual and as the agent of said Susanna, he paid so much of the said second note as said fraction C was estimated at, by transfer to the said Alexander, with his, complainant's, endorsement thereon, of a note for $1,500, made by James A. Terry, Stephen Register, and John W. Hawthorn, payable to Philip Jones, or bearer, and due the 1st March, 1839: that it was known said note would have to be sued on, at the time he endorsed it, and it was thought the suit against the makers would prove unavailing; and the arrangement was made between him and said Alexander, with the understanding that he should not be sued on his endorsement, or be compelled to pay said note, so endorsed, unless said Susanna completed her title to the same: that at the time of this transaction, said Green had actually obtained the patent to said fraction C, but complainant was ignorant of the fact:

that John Graham and Alexander Graham, who became the owners of this note, having sued the makers to insolvency, have sued complainant on his endorsement, and recovered judgment against him: that Green has died, and the title to said fraction C, is now in his heirs at law, by whom he has been evicted by action of ejectment: that he notified Alexander Graham of the pendency of the action of ejectment: that said Susanna is in very slender circumstances, and is unable to pay and satisfy the recovery, were he compelled to resort to the covenants of the deed, &c.: and the improvements he has made on the land are of greater value than the rents and profits, &c.

The bill prays for a temporary and perpetual injunction of the said judgment at law, and general relief.

The defendants severally answered the bill. The answer of Mrs. McNeill admits all the material allegations of the bill. The answer of Alexander Graham, denies his agency for Mrs. McNeill in the sale, and the representations charged to have been made by him; denies also that the note of Terry, Register and Hawthorn was endorsed to him by complainant, for fraction C, but insists that it was so endorsed in payment of the land sold to complainant by the deceased father of said Alexander; and admits most of the allegations of the bill. John Graham's answer denies all knowledge, and calls for proof.

John and Alexander Graham subsequently filed their cross bill, which, after reciting the original bill, alleges, that Tankersley, at a sale of the estate of said Daniel Green, deceased, in 1845, purchased said fraction C, at from four to ten dollars per acre, and that, if it should be established by the proof, to the satisfaction of the court, that said note of Terry, Register and Hawthorn was endorsed to Alexander Graham by Tankersley, as alleged in his bill, he should not be allowed a greater deduction on the judgment enjoined, than the amount he had paid at said sale of the estate of Green, &c. Tankersley's answer admits the purchase at four hundred and eighty-six dollars, but insists that the whole judgment should be enjoined. The proof is sufficiently set out in the opinion of the court.

The chancellor rendered a decree dismissing the cross bill,

and perpetually enjoining the judgment at law; all which is now assigned as error.

Hoit, and Bliss & Baldwin, for plaintiffs in error.

Was the note of Hawthorn, indorsed by Tankersley, given for, or on account of, the purchase money for fraction C, sold by Mrs. McNeil to complainant? This (the question of fact in the case) is affirmed in the bill, and denied in the answers. To prove the averment, complainant introduces but two witnesses, Hawthorn and Towles.

1. As to Hawthorn: his statement of the entire transaction is improbable in itself; as to the contract of liability on the indorsement, it is contradicted by the writing; as to his memory, he is shown to be unreliable—not recollecting even that he had given two depositions before, instead of one, as he states—and not remembering any thing as to Houston's note, turned out at the same time; he is contradicted by his former depositions, both of which are materially variant from the present: one of them describing differently the contract; the other mistaking the fraction and description, and stating Alexander Graham to have been acting, in receiving the note of Hawthorn, on his father's account,—as *we* contend was the fact. The last deposition, too, when his memory was farthest from the facts, is the most positive. That these former depositions can be read to contradict the witness, without calling his notice to them, or laying foundation, see Holman's heirs v. Bank of Norfolk, 12 Ala. 369, at p. 409. He speaks, moreover, from hearsay—the conversations of Tankersley and Green, as to the only important fact in his deposition.

2. As to Towles: he comes before the court in the suspicious attitude of a witness selected to overhear a conversation: he equivocates as to the purpose which took him to De Kalb—"Tankersley went to get a bill of sale, and he accompanied him," &c. His statement is, moreover, suspicious in the fact, that he dates the admissions of Graham at a time when he was litigating the very matter alleged to be confessed, or but shortly after, and just about the time of the filing of complainant's bill. (See case of Tankersley and Graham at law, here at a former term, and by agreement, con-

sidered part of the record.) Moreover, no one but the parties and witnesses were present at this conversation. "This is the weakest of all testimony admissible in law," and when at all suspicious, should be discarded. 2 Johns. C. R. 412; 4 Monroe, 239; 2 J. J. Marsh. 64; 1 Marsh. 588; 2 ib. 225; 1 Smedes & M. C. R. 195.

3. This proof, standing unopposed, would scarcely prevail against the denials of the answers; but it is directly contradicted by three witnesses for defendants—Overstreet, Archibald Graham, and Mrs. McNeill. Overstreet's evidence is of the same character, but of greater credibility, than Towles's: he was not called as a witness to listen for evidence; nor is his statement as to the time of admission so improbable.

4. Placing Overstreet as a set-off to Towles, and the complainant's case rests on a single witness, in opposition to the answer: but even that witness stands opposed to A. Graham and Mrs. McNeill, not by a counter-statement as to the same facts, but by other facts, in express inconsistency with them.

5. Nor do any corroborating facts exist to support the witness, and overturn the answer: these, to have that effect, must be strong, equivalent to one witness. What are they? First: the note ($1,500) would cover the price of the land at the rate at which all the land sold by Mrs. McNeill went: this, at most, would only show that the note might have been given for that fraction, not that it was: it is inconsistent with, not a proof of, the complainant's pretension: indeed, it is but a part of that pretension. But that note was given at the time, and in connection with another note. See sequel. Secondly: the assumption that Tankersley would not have paid for the land, the title to which was in dispute, and left unpaid the purchase money for that which was not in dispute.—1. This assumption is not even plausible: for it begs the whole question in issue: since the very thing denied is, that there was any portion of the purchase money unpaid, or unprovided for, either of the land sold by Z. Graham, or by Mrs. McNeill. To show the transparent fallacy of this pretence, we beg to state it: It is, that a portion of the purchase money was unpaid; that this was the purchase money for fraction C; and that the way of leaving it unpaid

was, by indorsing over this note, so as to bind himself to pay it---that indorsement showing, by irrefragable evidence, that it was to be paid by him, if the makers did not pay it! But, even if any presumption could be indulged against the written contract implied from the indorsement, it could only be of any force, from the fact that this was the only portion of the purchase money so left unpaid; but Houston's note (see answers and A. Graham's depositions) was indorsed at the same time, and in the same way; thereby showing that other portions of the purchase money were, in the same manner, left unpaid, by creating a positive liability to pay!---2. So far from showing a reservation of so much of the purchase money, the indorsement of Tankersley's note shows an actual provision for so much of it.---3. But again: whether Tankersley would withhold payment for fraction C, in any manner, would depend on three things:---1. That he was apprised of any defect of title or claim by Green, which is not shown. 2. That, if he was, he feared it, which he says he didn't; or, if he did fear it, that he was dissatisfied with the warranty he held: and, further, if he was, that the mere setting up of a claim by him would have enabled him legally to withhold payment: as it would not.

6. The defendant's witnesses are to the points: that Graham (A.) paid Mrs. McNeill's money collected from Tankersley to her; that she never assigned or transferred to A. Graham her claim on Tankersley; that Mrs. McNeill's notes were paid by Tankersley at different times, and before the transfer of the Hawthorn note: (Archibald Graham does not testify to the payment of the notes of Mrs. McNeill in 1839: but, supposing the notes due in January, speaks of the payment as the spring after—i. e., spring of 1838. Mrs. McNeill testifies directly against her interest, making herself liable for all of the debt, a large portion of which she was able to pay, having no interest, and testifying with fairness. Mrs. M. does not say G. paid her in negroes.

7. The account Tankersly gives in his bill is altogether impossible and unnatural. The object of the arrangment which he says was agreed, was not only defeated by the means he took to effect it, but they were preposterously inappropriate and injurious. The note was agreed, he says, to

be taken by Green, he knowing it to be insolvent, in substitution of a good note: to be sued, but with no prospect of getting any thing by suit. T. to pay 10 per cent, for this unnecessary trouble and wanton expense; if the makers paid any thing, though T. was to lose it; and all to while away the time until it could be seen whether Green's claim was good! If the suit on the note brought nothing, it was a useless expense; if it did, it was a dead loss! now, why not postpone suit on Tankersly's own note, until this fact of Green's title could be ascertained: T. holding H's note, with the claim of making what he could not out of it?

8. The Grahams supported their answer by this consistent course; to the first court after getting the Hawthorn note, *they* sued the makers in their names, or to their use; and after the return of "no property," they sued again the endorser T. Now, why should *John* Graham have sued? *He* was no agent of Mrs. McNeil, nor should he be in any way connected with her business.

As to the questions of law, we contend,

I. That if the complainant were entitled to the relief, the whole cause shows that he was not entitled to the relief asked by the bill, nor upon the facts shown in the bill; and the title therefore, must be dismissed; for,

II. He was entitled only, at most, to a reimbursement of what he had been compelled to expend, and had expended in getting in his title.

1. Where the relation of vendor and vendee existed, the vendee was a trustee for the vendor, and was bound, as in other cases of trust, to act fairly for the *cestui que trust:* to take no advantage to himself from his position or the trust; especially to make no arrangement behind the back of the vendee, for his own profit. Now,

2. The question is not, whether, *while in possession, he bought in the title* of Green's heirs; the question is, did he gain any advantage while in possession. He did: he agreed not to defend, but to let judgment go against him by default, long before it could be obtained in due course of law. He retained possession in consequence of this arrangment, until the sale, at which he bought. He bargained for the land; had the bargain carried into effect by the sale, and bought it

in. But if the land was *not* sold by his procurement, and to give effect to his bargain, he was evicted, if at all, by his own act and assent, and such eviction was no better for him than if he continued in possession. The sale subsequent to his permiting the possession to go from him, was really in pursuance of it; and he can claim nothing from it.

3. He never was evicted: he agreed with Andrews, the executor of Green, to a constructive delivery of possession; but Andrews, as executor, nor otherwise, so far as appears, had not authority to take or receive possession.

4. Tankersley could not make a secret renunciation of his character as trustee: Mrs. McNeill was entitled to notice: the surrender was a betrayal of the trust: she should have had an opportunity to defend the title, and to protect the possession. Notice to the Grahams, even if proved, was not sufficient: it was *her* title that was attacked: they were not her agents, general or special. A public sale—especially to a non-resident—was no more in effect, than a private sale. As to this last point, see Hill on Trusts, 536.

5. It is the same whether Tankersley were in possession or not, when he bought in the title of Green's heirs, so far as the facts of this case go. This is evident, from the character the vendee bears—that of a trustee: a trustee, being concerned about the trust only for another, cannot avail himself of the position, to the injury of him who puts him into it: it would be a fraud; and the fraud would be precisely the same in a case where the possession, being given by the vendor, was secretly surrendered by the vendee, without the knowledge of the vendor, and the vendee dealt with the title for his own profit, as where he retained the possession and so dealt: and the case would be stronger, if by the act, bargain and procurement of the vendee, this possession was given up: (e. g. the case of an ordinary trustee secretly resigning his office, &c.) the duties of the trust plainly are, to apprise the *cestui que trust* of whatever imports his interest to know; and, if he withholds that information, and acts for himself about the trust property, he can get nothing from this breach of trust.

The court will see the absolute necessity of this rule: since in every case, the vendee, by attornment or temporary aban-

donment of the possession, could part with the possession, in ignorance of the vendor, and then buy in the title: then speculate at will on the rights, and at the expense of the interests of the vendor: and thus all the evils of collusion and adverse interests of tenants, which the rule was intended to keep down, would prevail. The rule is, "if a purchaser gets an advantage by being in possession, *or behind the back* of the party interested," "he shall hold it in trust," &c. 4 Dana, 95. The purchase of T. was literally against this rule.

6. If all other points fail, we submit that the court unquestionably erred in not ordering an account for rent, &c., until Tankersley was in possession: these could not be lumped, and the value of the improvements, guessed at by Tankerley, conjectured by the court, and set off against the rents. Besides, for these improvements, Tankersley was entitled to rebatement of rents from Green's heirs, and probably got it: or, if he did not, it was his own fault, and he is amenable, as if he did. Pulliam v. Robinson, 1 Monroe, 330. He was in under our title from 1836 to 1843.

R. H. Smith, for defendant in error.

1. The note on Register, Terry and Hawthorn, was given and endorsed in lieu of the purchase money, due on fraction C. This appears from the evidence of Hawthorn and of Towles, and from the deposition of Archibald Graham itself, if considered with reference to the bill, and answers: thus, the bill says, the land was bought of Mrs. McNeill, on 18th May, 1846, and the notes for the purchase money were payable in *one and two years;* and these allegations are admitted by the answers, and proved by Mrs. McNeill's deed. The bill also says, that the note on Register, H. and T., was endorsed on 1st May, 1839. This is also not denied, but is in substance, admitted in the answers. The witness swears that the notes for Z. Graham's land was paid in the latter *part of the summer, or early in the fall after both fell due.* He said the McNeill note was taken to Sumter in the spring after maturity, that is in the *spring of* 1839, and after Alexander's return, he and Mrs. McNeill settled. Now, the note on Register, H. and T., was passed in *the spring of* 1839, and it follows, that it was passed in payment of the McNeill debt,

and not in payment of the Z. Graham's debt, which was paid the previous *summer or fall.* The witness thinks, or concludes to the contrary, but these facts tend to an irresistable conclusion, and against which the witnesses conclusions are nothing.

From the deposition of Mrs. McNeill, it is apparent that she and Alexander Graham had a disagreement about his conduct in the matter ; that Alexander Graham paid her in negroes for the last note. The conclusion from all this is, that she was not content with his taking the note on Register, H. and T. ; that he and John then settled the matter by themselves, taking the note and settling with her.

The deposition of Overstreet is too uncertain, and vague, (if not senseless) to be of any force. It is also in reply to no matter about which he was interrogated ; is suspicious, and is contradicted by Boyd.

The testimony of Hawthorn is in no wise attacked—*no foundation was laid for attacking it*, and there is no discrepancy of importance, in his deposition in this case, and in the one at law. Neither complainant or defendant, insist that the note was endorsed for *fraction G.*

2. The bill and decree *pro confesso* against Mrs. McNeill, establish the non-residence and practical insolvency of Mrs. McNeill, and either are sufficient to entitle us to an injunction. They are sufficiently averred in the bill. Cullum v. Br. Bank, 4 Ala. 21 ; 8 Dana. 164 ; ib. 32 ; Wyatt v. Greer, 4 S. & Port. 318.

3. A cross bill is founded upon a state of facts growing out or connected with the matters involved in the bill, and giving the defendant some right to a cross action. Like every other suit or bill, it must rest upon an allegation, that the matters set up by it are true. Now the cross bill in this case, rest upon what is denied to be true in defendant's answer—the cross bill still sets up that the chief allegation on which its relief depends, and to which all the other allegations are subordinate, are untrue, and prays for certain relief, provided the answers be proven false. The cross bill is loose, vague, and uncertain, in its allegations.

4. The cross bill cannot be sustained, because although it is generally true that a vendee buying a title over his vendor,

shall (by analogy to landlord and tenant) stand as trustee for his vendor, and only be entitled to be reimbursed what he has paid: yet, the relation to subsist must be mutual—here our vendor and those representing her, repelled the idea of the relation and thereby exonerated us from it. 5 Ala. 417; 10 ib. 17; 5 ib. 407.

The above doctrine, also, rests upon the policy of forbiding *secret purchases* by vendees, over vendors, and does not apply to cases of public sales. Jones ex'r. v. Lightfoot, 10 Ala. Rep. 17.

CHILTON, J.—1. It is objected, that the bill in this case contains no averments as to the insolvency of Mrs. McNeill, the vendor, to give the court jurisdiction. This objection is not sustained by the record. The bill avers, that she is in very slender circumstances, and unable to respond in damages which the complainant may recover in an action at law upon her covenant of warranty. Besides this, she is charged to reside beyond the jurisdiction of the court. Several decisions of this court, we think, very clearly show, such averments are sufficient to authorize the vendor to come into chancery, to enjoin the collection of the purchase money for land, the title to which is in a stranger. Greggs v. Woodruff, 14 Ala. Rep. 9; Cullum v. Mobile Bank, 4 ib. 2; 8 Dana, 164; 6 ib. 32; Hunter v. O'Neal, 12 Ala. Rep. 37.

Mrs. McNeill admits her inability to respond in damages to the complainant for a failure of title, and she certainly knows more about her own condition as to solvency than her brothers, who testify upon the subject, and who mistake the number of her slaves. Under the facts presented by the record, we think the jurisdiction of the court, so far as it depends upon the inability of the vendor to respond upon her covenant, sufficient to warrant the interposition of the court to prevent the complainant being driven without the state to seek, at most, a doubtful remedy against his vendor.

2. But it is insisted that Tankersley cannot resort to a court of equity to seek relief against the remaining note for the purchase money, because, when sued, he failed to notify his vendor of the pendency of such suit. This position cannot be maintained. In order to conclude Mrs. McNeill by

the judgment which was rendered in favor of the heirs of Green against Tankersley, she must have been notified of the pendency of the suit, and have been required to defend. This not having been done, the judgment of recovery against Tankersley, does not conclude her in any way, and she may make, as against him, any defence which she could have set up in bar of a recovery of the land, and damages from him. It is not, however, pretended that she had any available defence to the action. On the contrary, it is clearly shown that the heirs of Green have the legal title, derived directly by descent through their ancestor, to whom a patent had issued from the government.

3. The notice of the pendency of the suit, given to Alexander Graham, was insufficient to charge Mrs. McNeill. Graham was her agent "to receive and collect the note," but it is very clear, that this gave him no authority to bind her in respect to the defence of a suit brought against her vendee. Were such the law, every attorney who receives a note for collection, would be converted into a general agent of the payee, in respect to all matters connected with its consideration. The authority in this case was conferred for a specific purpose, and limited to a particular object. It cannot be extended beyond that object, so as to embrace matters clearly not within the contemplation of the parties at the time it was conferred. Story on Agency, § 68 to 71; Wallace v. Br. B'k Mobile, 1 Ala. R. 565; Wood v. McCain, 7 ib. 800; Scarborough v. Reynolds, 12 ib. 252.

4. It is insisted, however, that the complainant below was not entitled to relief, because it does not sufficiently appear the note on Register, Terry and Hawthorn, upon which the judgment sought to be enjoined, was rendered, was given in consideration of the land from which the complainant was evicted, but was given for other lands purchased at the same time, from Zachariah Graham. We have carefully examined the testimony, and without incorporating it in this opinion, will state, that it fully sustains the bill, as to the consideration of the indorsement upon the note. In the first place, it is highly improbable the party would fully pay for land to which the title was confessedly doubtful, and risk his indemnity against his non-resident vendor, on her covenant of war-

ranty: and then, Hawthorn positively swears that he was present when Tankersley indorsed the note; that it was done at his house; that Tankersley refused to pay for fraction C, (the land in dispute,) until he should be indemnified against Green's claim. The testimony of this witness is corroborated by Towles, in an important part of it, who proves, that Alexander Graham told him the note was given for fraction C. Add to this the correspondence of the note with the price of the land, and we think the conclusion cannot well be resisted, that the note in controversy was indorsed by Tankersley, in consideration of said fraction C. That in speaking of the note, Tankersley may have stated to the witness, Overstreet, that the same was indorsed for the land he had bought of *the Grahams*, is a declaration which can have little or no weight as proof, when we consider the Grahams had taken part in the negotiation, and that Tankersley may have looked upon Alexander, who, according to his admission in his answer, was present, and exhibited the title papers, and did some of the talking, as the agent of his sister, Mrs. McNeill. Neither do we think the effort successful, to impeach the testimony of Hawthorn, from the fact, that in a previous deposition, he had described the fraction as designated by the letter G, instead of C. His attention was not called to the apparent discrepancy, upon his examination, so as to afford him an opportunity of explaining, and the land is otherwise identified as the same, being the fraction for which Green was asserting an adverse claim.

5. The cross bill in this case was properly dismissed. It is in direct conflict with the answer of the party filing it, and proceeds upon the ground of the truth of the allegations of the bill in respect to the consideration of the indorsement of the note, which the answer denies. The plaintiff in the cross bill cannot be allowed to contradict his answer in the original suit. 3 Dan. Ch. Pr. 1746; Savage v. Carter, 9 Dana, 414; Hudson v. Hudson, 3 Randolph, 117. His answer, which must be considered true as against himself, destroys the equity he asserts by his cross bill. If, however, we were mistaken in this view, the plaintiffs in the cross bill are not entitled to the relief which they seek, in as much as its allegations as to the purchase, or agreement to purchase by Tan-

kersley, of the land to which the title has failed, are denied by the answer, and disproved by Andrews. It may also be added, that we see no reason why the matter set up in the cross bill, may not be insisted on by way of answer. The proper course would have been, if the defendants had mistaken the facts as to the consideration of the indorsement on the note on T. R. and H. for them to have obtained leave to amend, admitting the allegations of the bill, and setting up the supplemental matter, as a reason why the complainant should not enjoin more of the note than would repay him the amount he had given on the purchase of the land from the estate of Green, with the expense of defending the suit, &c. This they failed to do, but litigated with the complainant, some fourteen months, the question, whether the note was given for the land, and doubtless finding, after the proof was taken, that the allegations of the bill were susceptible of proof, and that they must fail in this defence, they exhibit a cross bill, praying to be relieved as to all except the price paid for the land, in the event that Tankersley should succeed in establishing the falsity of their answers. And thus, after trying one defence, and failing, they desire to set up another, entirely the opposite of the first. Willet v. Fayerweather, 1 Bar. S. C. Rep. 72.

It is the settled rule, that when the defendant has mistaken the facts in his original answer, he cannot contravene his admissions otherwise than by moving to correct it, either by amendment or supplemental answer. He cannot do so by cross bill. 2 Dan. Ch. Pr. 916, and authorities cited. The same rule must apply, where he affirms by his cross bill what he denies in his answer.

6. The cross bill being out of the case, there remains no allegation in the pleading, putting in issue the subsequent purchase of the land by Tankersley, and as the rule requires that the decree must be founded on the allegations of the pleadings, as well as the proof, it follows that the chancellor properly disregarded the purchase made by Tankersley after he had filed his bill. See Carneal v. Banks, 10 Wheat. 181; Gregory v. Power, 3 Litt. 339; Carson v. Gibson, 3 Ala. R. 421; McKinley v. Irvine, 13 ib. 681. This view is conclusive of the case. There is no controversy about the fact, that

the title to the land had wholly failed, and that Green's heirs had received it of Tankersley before he filed his bill. He avers that his improvements made on the land are worth more than the rents, from the time of his purchase up to the issuance of the patent to Green. This averment is admitted by the default of Mrs. McNeill, and not denied by the other defendants. Under these circumstances, we think the chancellor correctly enjoined the collection of the note out of the complainant below, and that there was no necessity for a reference, to ascertain the amount of the rents, and value of the improvements.

It is unnecessary to state what would have been our conclusion had the subsequent purchase of the land by Tankersley been properly presented before us. We are not at all sure, that the defendants have been injured by their failure properly to present it, since they were advised of Green's claim long before the bill was filed, and eight months elapsed after it was filed, before Tankersley, purchased the land. During all this period no steps were taken to perfect his title by the defendants. But we may not look into these matters. Let the decree be affirmed.

GIVENS v. KENDRICK.

1. If G, intending to commit a trespass on the public lands, by cutting down and carrying away trees, through mistake cuts down trees on the land of K., he is liable to K., in an action of debt, for the penalty imposed by the statute of 1807.
2. The cutting down of trees on the land of another, without his consent, and with knowledge on the part of the trespasser, that the land does not belong to him, is sufficient to subject him to the penalty imposed by the statute of 1807, although the trees may not be carried away. Clay's Digest, 581.

Error to the Circuit Court of Talladega. Before the Hon. George W. Stone.

This was an action of debt, for cutting down, and carrying away, thirty pine trees, from off the plaintiff's land, without the consent of the owner. On the trial, it appeared, that Givens had hired one Davis, to build him two houses, and was to show him public land, on which the timber was to be cut. The defendant, and Davis went together, and the defendant pointed out the place where the trees were to be cut, and told him that it was public land. About an hour afterwards, the defendant returned to where Davis was cutting, and told him he had understood that the land where he was cutting belonged to the plaintiff, and that he must move further off. The trees cut by Davis, were used by him in building the houses for defendant, but the defendant was not at home when they were hauled off the plaintiff's land, nor did he know of the hauling at the time it was done. Under this proof, the defendant requested the court to charge the jury, that under the pleadings, it was necessary to prove both the cutting, and taking the trees from the land of the plaintiff; which the court refused. The defendant also requested the court to charge the jury, that if the contract was, that the defendant was to show Davis public land from which to cut the trees, and under this contract, he showed Davis the land of the plaintiff, that the defendant was not liable in this form of action; which the court refused.

To the refusal of the court to charge as asked, the defendant excepted, and now assigns it as error.

L. E. Parsons, for plaintiff in error.

1. The allegation in the declaration is this: "the defendant cut down and took away;" and the court was asked to charge, that under the pleadings in this case, it was necessary to prove "both a cutting and a taking." This proof is certainly necessary to sustain the charge in the declaration, and should have been given. The statute makes the acts of cutting down, taking away, or destroying, separate offences. The plaintiff complains of cutting down and taking away. Clay's Dig. 581.

2. The defendant did not take any away, and "there was positive proof of his being away at the time the trees were

hauled on to his premises, and that he knew nothing of it, or of their being put up. He had, previous to leaving home, told Davis not to cut where he had first shown him, as he had been told that was Kendrick's land. This, then, was not a wilful cutting. Russell v. Irby, 13 Ala. 134. The man Davis was not the servant of Givens in doing this work, except as a contractor; and if he cut on the land of K. after notice, he alone was responsible. Strong v. Stebbins, 5 Cow. Rep. 210.

Rice & Morgan, contra.

1. Davis was the agent of the plaintiff in error in cutting the trees, and by the contract, the plaintiff was to show Davis where to cut the timber.

2. The statute is in the disjunctive: cutting trees is an offence of itself; and it is not necessary that the trees should be taken off the land.

3. The case of Russell v. Irby, 13 Ala. Rep. 131, is not in point with this case. There, the party supposed he was cutting the trees on his own land; in this case, Givens went out for the purpose of committing a trespass on government lands, and was only mistaken in committing the trespass on the lands of the plaintiff.

DARGAN, J.—In the case of Russell v. Irby, 13 Ala. 131, we held, that if one by mistake, should go beyond his own boundary, and cut down trees, under the impression he was cutting on his own land, although he was liable for damages at common law, yet he did not incur the penalty imposed by the act of 1807. Clay's Dig. 581. The defendant was excused from the penalty, because he did not intend to commit a trespass, but had done so without intending wrong, or injury to the rights of any one. The case at bar, however, shows, that the defendant intended to commit a trespass on the public, in cutting the trees, but by mistake trespassed on the plaintiff. We can perceive no reason why he should be exempted from the statute penalty. The rights of the public should be regarded by law, with as much care as the rights of an individual; and if the intention had been to commit a trespass on A's land, but by mistake it was com-

mitted on the land of B, we could not protect the defendant for his honest intentions, for he intended a trespass. Nor can he claim protection because he intended a trespass on the public, with any more grace, than if he intended to commit the trespass on the land of an individual, but by mistake went on the lands of one, he did not intend to injure. Both his act, and his intention, were tortious, and he cannot claim exemption from the penalty of the statute.

The plaintiff in error also insists, that the court should have given the charge, "that it was necessary to prove, under the pleadings in this case, both a cutting, and a taking away from the lands of the defendant." We do not well perceive how this charge, if given, could have benefited him, for the record shows, that the proof was full, and ample to show, not only that the trees were cut on the land of the plaintiff, but that they were hauled away, and were used in the building of the house of the defendant. But we are entirely satisfied, that the cutting alone, if done with a knowledge that the party was doing a wrongful act, or that he was cutting trees on land which did not belong to him, is sufficient, and that it is not necessary he should carry them off, in order to subject him to the penalty. The language of the act is, "if any one shall cut down, carry away, or destroy." The design of this act, was to prevent trespasses on the lands of others, and it would be a perversion of the language, as well as of the intent, to hold, that one does not incur the penalty by cutting down alone. The disjunctive "or," is used, and the party may incur the penalty by cutting down, or by carrying away, or by destroying trees, on the lands of another.

There is no error in the judgment, and it must be affirmed.

CROFT, GUARDIAN, v. TERRELL ET ALS.

1. The omission of the orphans' court to give notice, by publication, to a guardian, who has removed from the state, to file his accounts and vouchers for final settlement, is a fatal error, unless it is cured by the voluntary appearance of the party.
2. A decree of the orphans' court, against a guardian, which adjudges to the wards *jointly*, the aggregate sum found in his hands, is erroneous. It should designate the interest of each ward separately.
3. A decree for the interest of a married woman, in the distribution by the orphans' court, of funds in the hands of her guardian, should be in the names of the husband and wife, for the use of the wife.

Error to the Orphans' Court of Chambers. Before the Hon. Clement C. Forbes, Judge.

IN this case, a petition was filed by defendants, praying that the plaintiff in error, as guardian of the heirs of John Terrell, deceased, and who had removed from the state, should be compelled to make settlement of his accounts. Two of the heirs were married women, and they and their respective husbands, together with the other heirs, who are adults, united in the petition. The court granted an order of publication, as the statute requires, but it does not appear the publication was ever made. At the hearing, the plaintiff in error appeared by attorney, as he had previously done in moving for and obtaining a continuance, and in crossing interrogatories, filed by the defendants. The plaintiff failing to state an account, the court did so, and ordered publication, which was duly made, notifying the plaintiff that unless he appeared, as therein directed, and show cause to the contrary, the account so stated by the court, would be allowed, and the plaintiff not appearing at the time specified, the court thereupon allowed the account so stated, amounting to $1078 12, and rendered a joint decree in favor of the husbands of the married wards, in right of their wives, and the other defendants in error, reciting in said decree that the plaintiff in error,

was shown to be the guardian of said heirs, regularly appointed by said court.

Various errors are now assigned on the proceedings and decree of the court; all of which are noticed in the opinion.

RICE and MORGAN, for plaintiff in error.

1. The notice was not given, which the statute requires, as to guardians removed out of the state. 11 Ala. R. 461-4. 2. Judgment could not be rendered for an aggregate sum; the interests of each of the wards is distinct. 3. Judgment should have been rendered in the name of husband and wife, for the use of the wife. 4. The record does not show that Croft derived his appointment from the orphans' court of Chambers county.

BAUGH, for the defendants in error.

COLLIER, C. J.—It appears from the record, that publication was ordered to be made for three months, as directed by the act of 1843, (Clay's Dig. 230, § 47,) requiring the plaintiff in error to file his accounts and vouchers for final settlement; but it is not shown that publication was made according to the order. The omission to discover that such was the fact, would be a fatal error, but for the appearance of the guardian, which we think would cure it. Speight v. Knight, 11 Ala. 461. In respect to the notice consequent upon a statement of the guardian's account, if any was necessary, it appears to have been given by three weeks' publication in a newspaper; this was quite sufficient. Clay's D. 226, sec. 27; Williamson et al. v. Hill, 6 Por. Rep. 184; Davis v. Davis et al. 6 Ala. Rep. 611.

The assignment, which denies that it appears the guardian derived his appointment from the orphans' court of Chambers, is not sustained by the record, which expressly alleges the reverse. See, however, Speight v. Knight, 11 Ala. R. 461.

By the act of 1830, it is enacted, that all decrees made by the orphans' court, on final settlements of guardians, &c., shall have the force and effect of judgments of law, and executions may issue thereon for the collection of the several distributive amounts: *Further*, each distributee, &c., shall

have his writ of execution or attachment against the guardian, &c. The act of 1832 provides, that on such settlement, the orphans' court "shall insert in their decree the amount of the several distributive shares." Clay's Dig. 304-5, § 42-3-4. In the case before us, the decree does not ascertain to what sum each of the distributees is entitled, but adjudges the aggregate amount in the guardian's hands, to all of them jointly. It is clear that such a decree does not conform to the statutes cited, and if it could be sustained, would leave the several interests of each for future adjustment. An execution would conform to the decree, and issue in the joint names of all of them; or if one or more of them were to die, upon a regular suggestion of that fact, would issue in the names of the survivors, thus authorizing each to enforce the collection, not only of what was due to himself, but what belonged jointly to all. The settlement and decree against the guardian, should have severed the interests of the wards. Here is an irregularity which this court cannot correct, by an amendment making the decree several; for it cannot be assumed that each of the wards is entitled to an equal proportion of what remains in the guardian's hands, and there is nothing in the record imparting information on the point.

In respect to the female wards who have married, the decree should be in favor of themselves and their husbands, severally, for the use of the wives; and if any of the legatees are minors, they should be adjudged to recover by their guardians, but the record does not show such to be the condition of any of them. Key, adm'r of Seward v. Vaughn and wife et al., at this term. But if the decree was otherwise regular, this error would be here corrected, at the costs of the plaintiff in error.

For the errors noticed, the decree of the orphans' court is reversed, and the cause remanded.

TRUSTEES OF THE UNIVERSITY OF ALABAMA v. WALDEN.

1. Where, by a law of the University of Alabama, duly published, its tutors are required to hold their offices for the term of two years, unless permitted by the executive committee to resign, and by one of its ordinances, their salaries are fixed at $1,000 per annum, the election of a tutor, and his acceptance of the office, whilst such law and ordinance are in force, constitute a contract between him and the University, and the latter cannot, within he two years, reduce this salary, without his consent.
2. The acceptance, by a party, of a portion of his demand against another, without any agreement to release the balance, is not a waiver of his right to insist upon the payment of such balance.

Error to the Circuit Court of Tuscaloosa. Before the Hon. George D. Shortridge.

This was an action by defendant, against plaintiffs in error, to recover his salary as tutor in the University. The case was submitted on an agreed state of facts, which are set out in the opinion of the court, and upon which the court below rendered judgment for the defendant in error. This judgment is now assigned as error.

P. & J. L. Martin, for plaintiff in error.

1. By the laws governing their action, the board of trustees, in the reduction of the salary of the defendant in error, had the power to fix the same, as they considered the interests and welfare of the institution demanded, for the *future services* of that officer. They had the power, at any time, to abolish the office itself, if the good of the University required it; and the officer held his appointment, subject to their control in that regard. And this power is not impaired by the conservative stipulation, that he should not resign without the consent of the executive committee. That was an express stipulation, intended to guard against injury which might be done by a combined effort to control the action of the board; and did not create an implied undertaking, to re-

tain the officer at the salary fixed beyond their pleasure; or to continue the salary unaltered. The right to the salary for past services, is all that could be demanded. See Commonwealth v. Bacon, 6 Serg. & R. 322.

2. Having received the reduced salary quarter yearly, it was a discharge of the liability to defendant in error—his further demand to the contrary, notwithstanding. It amounts, in law, to an acquiescence in the change, and cannot be now complained of. There might be a pretext for the demand now made, if leave had been refused the defendant by the executive committee, to resign, and no money had been received. He cannot, however, accept the salary offered, and then claim a further sum: the payment received is a full discharge. 4 Mass. 632.

E. W. Peck, for defendant in error.

The election of the defendant in error, and his acceptance, was a contract; and, consequently, his salary, for the period for which he was elected, could not be reduced by any subsequent ordinance of the plaintiffs in error, without his assent. Murdock v. The Phillips Academy, 12 Pickering, 244, 254; The Dutch Church at Albany v. Bradford, 8 Cowen, 457, 473, 475; Torrington v. Avery, 3 Mass. Rep. 160; see Clay's Dig. 583, § 2, 3; 585, § 16.

CHILTON, J.—The trustees of the university, on the 17th Dec. 1841, elected the defendant in error, as tutor of ancient languages in said institution. He was informed of his appointment by letter from the president of the board, on the 18th Dec., and requested by letter, to signify his acceptatce of the appointment. The defendant accepted, and entered upon the tutorship the 1st Jan. 1842, and discharged its duties faithfully for two years. The first year, he received for his salary from the plaintiff, the sum of one thousand dollars, in quarterly payments: the second year, he claimed the same salary. Defendants refused to pay him that sum, but paid him eight hundred dollars, quarterly, and this suit is now brought to recover the remaining two hundred dollars.

At the time of the election of the defendant in error, there existed an ordinance of the university as follows—"*section*

third: And be it further ordained, that there shall be a tutor of mathematics, and a tutor of ancient languages, to be elected by the board—that it shall be the duty of the tutors to teach such branches in their several departments, respectively, as may be assigned to them by the faculty, that the annual salary of the tutors of mathematics and ancient languages shall be one thousand dollars. *Section fourth:* And be it further ordained, that no officer of the university shall resign until he shall have given six months notice, and the board shall at all times, have the power "to modify the duties required of the different officers, and to impose additional duties." This ordinance was passed on the 11th Dec. 1837. It was further shown, that at the time of the election of the defendant in error, the following law of the university was in existence, and had been duly published:—"When any person shall have been elected to, and shall have accepted the office of tutor in the university, he shall continue in office for a term not less than two years, unless he shall be permitted by the executive committee, or the board of trustees, to resign sooner."

On the 17th Dec. 1842, the board of trustees passed an ordinance reducing the salary of the tutors, to eight hundred dollars, to take effect from and after the 1st of July 1843.

The question for decision is, whether the board had the power to reduce the pay, to which the defendant in error was entitled, under the law of the university, as it existed at the time of his election he not having consented to such reduction.

In the case of the Commonwealth v. Bacon, 6 Serg. & Rawle, 322, it was held, that an ordinance of the select and common councils of the city of Philadelphia, which reduced the salary of the mayor, after the commencement of his term of service, was valid. The court said, "this connot be considered in the nature of a hiring for a year, *because it was not obligatory on the mayor to serve out the year.* This case is relied upon by the counsel for the plaintiff in error; but although we think it a very correct exposition of the law, we do not think it sustains the view for which they insist, in the the case at bar. Conceding that in all cases of public officers, (excluding such as are expressly excepted by the constitution) it is competent for the legislature of the state, or for a muni-

cipal corporation empowered to make laws, as the case may be, to reduce the salaries, or fees of such officers, during their term of service, it is very clear this principle has no application to cases, which partake of the nature of contracts.

Is this a contract between the trustees and the defendant in error? The nature of the defendant's undertaking, and the extent of the obligation imposed on him, must be ascertained, as they are defined by the laws of the university, in force at the time he accepted the employment tendered him. By these, he was compelled to serve as a tutor for two years, unless he was authorised to resign before the expiration of that time, by the executive committee or board of trustees, and under these, he could not resign unless upon having given six months previous notice. In consideration of this service, he was entitled to receive each year, one thousand dollars, payable quarterly, t,he board of trustees having the power to modify the duties performed by him, or to impose additional duties. Thus considered, the engagement evidently amounts to a contract. Suppose, as a test of the principle, that a day after he had entered upon the duties of his office, the compensation had been reduced to fifty dollars instead of eight hundred. Could it be tolerated that the party should be bound to labor two years for so trifling a compensation? If, however, the doctrine contended for, be correct,---it was discretionary with the trustees as to how much should be paid, and the tutor must be content with whatever their sense of justice and propriety may prompt them to allow. Such is not the law. He was bound to serve for two years, and for that service was entitled to one thousand dollars each year. This compensation could not be diminished, against his consent, without a violation of the contract on the part of the trustees: (see the authorities on the brief.)

The defendant in error did not waive his right to insist on a full compliance with the terms of the contract on the part of the plaintiff, by receiving the $800 The evidence does not show that he received the less sum under any agreement to release the remaining portion due him, and it might well be questioned whether if he had agreed to remit the other two hundred dollars, such agreement would not have been void for want of consideration. 12 Ala. Rep. 252.

We are unable to discover any error in the record of the proceedings in the circuit court. Its judgment is consequently affirmed.

McGEHEE v. CHANDLER ET ALS.

1. If a sheriff entertains real doubt, as to whether property, in the possession of a defendant, is liable to an execution in his hands, he may demand a bond of indemnity from the plaintiff, before levy made, and if the plaintiff, on such demand, refuses to indemnify him, he is not liable for failing to make the money on the execution.

Error to the Circuit Court of Perry. Before the Hon. John D. Phelan.

This was a motion by plaintiff in error, against defendant, as sheriff of Perry county, and his securities, for failing to make the money on an execution in his hands in favor of plaintiff, against one Hopkins. It appears from the bill of exceptions, that after the plaintiff had proved that during the time the execution was in the sheriff's hands, Hopkins had in possession property sufficient to pay and satisfy the execution, the defendant introduced in evidence a deed of trust from said Hopkins to one Lockhart, of all the property he had in his possession, which deed was of a date prior to that of the execution, and was made to secure debts due by him to sundry persons, and proved, that the trustee in the deed had, before the issuance of the execution, forbid his levying on any of said property, and that after the execution came to his hands, he had notified the plaintiff that he had doubts as to the liability of the property to the execution, and that he would not levy without a bond of indemnity; which the plaintiff refused to give. The court charged the jury, that if the sheriff entertained doubts as to the liability of the property, he had a right to demand a bond of indemnity from

the plaintiff, before he levied the execution, and that if he made such demand, and the plaintiff refused to indemnify him, he could not make him and his securities liable for failing to make the money on the execution. To this charge the plaintiff excepted, and now assigns it as error.

Brooks & Byrd, for the plaintiff in error.

1. At common law, the sheriff, if he doubted that the goods were liable to the execution, might summon a jury to satisfy himself. Allen on Sheriffs, 152; 8 Bacon, 705. But the plaintiff in execution is never bound to tender an indemnity, until the jury have passed on the right of property. Curtis v. Patterson, 8 Cowen, 67; Jessup v. Brown, 2 Gill & Johns. 404.

2. The statute alters the common law, so far only, as to authorize the sheriff, after a levy, to discharge the same, in case of doubt, unless a bond of indemnity is given in ten days after notice. See Clay's Dig. 210, § 50. But the sheriff cannot require the bond before the levy.

A. B. Moore, contra.

1. If a sheriff has a real doubt as to whether the title to property is in the defendant in execution, he may demand a bond of indemnity of the plaintiff, and if he refuses to give it, the sheriff is justifiable in refusing to levy the execution. See 7 Ma. Rep. 243; 9 Porter, 481.

2. At the common law, the sheriff could only summon a jury to try the right to property, where an actual levy has been made. See 8 Cowen, 65; 10 Johnson, 98; 15 ib. 147.

3. There could be no sound reason for permitting a sheriff, when he has real doubts as to the title of property being in the defendant in execution, to demand a bond of indemnity after he has made a levy, and not permit him, if his doubts arise before the levy, to demand a bond.

DARGAN, J.—I think the question presented by the bill of exceptions, has been settled by the adjudications of this court. In the case of Robertson v. Beavers, 3 Porter, 386, it is said, "if the sheriff had doubts as to the right of the property, he might have required bond of indemnity from the

plaintiff, or his agent, but not having done that, but having omitted to levy, he was bound to show due diligence in endeavoring to collect the money. And in the case of Minter v. Bigelow & Co. 9 Porter, 482, it is said, that "if a sheriff return an execution *no property*, it is incumbent on the plaintiff to show, that the return is presumptively false. This may be done, by showing that the defendant was in possession of property, and if he is not the owner of it; or if it is not subject to the payment of the defendant's debts, it will devolve on the sheriff to show that such was its condition. But he will however be relieved from this burthen, if he has used the precaution, whilst the execution was in his hands, to require a bond of indemnity from the plaintiff, who has declined to give it. So also, in Ogden, Wadlington & Co. v. Powell, 7 Ala. 243, it is said, "that to justify a sheriff in releasing a levy already made, or in refusing to levy because the plaintiff in execution would not execute a bond of indemnity, he must show that a real doubt existed as to the title of the property. I admit, that this is a liberal construction of the act of 1807, (Clay's Dig. 207,) the language of which, is, "if any sheriff shall levy an execution on property, and a doubt shall arise whether the right of the property is in the debtor, the sheriff may apply to the plaintiff, his agent, or attorney, for bond and security, for his indemninification for the sale of the property," &c. Yet as this court has construed this act, as giving the sheriff the right before the levy is made, to demand indemnity, if real doubts as to the title of the property exist, we think it better to rely on the principle of *stare decisis*, than to adopt a more rigid rule of construction, especially as the practice has prevailed heretofore, of giving indemnity to the sheriff in cases of doubt, if required by him, before the levy is made. We therefore must hold, that if a sheriff, having real doubts, whether the property in the defendant's possession be subject to the execution, applies to the plaintiff for indemnity before levy, who refuses to give any, he may, for such refusal, return the execution "no property."

Under this view, there is no error in the record, and the judgment must be affirmed.

SCOTT v. McKINNISH AND WIFE.

1. In an action of slander, exculpatory declarations, made by the defendant, subsequently to the speaking of the actionable words, are not admissible in evidence.
2. In an action of slander, common report of the truth of the fact, which the slanderous words assert, is not admissible in mitigation of damages.
3. In an action of slander, it is not necessary to prove the identical words charged, but proof of words substantially the same is sufficient.
4. Where a declaration, in an action of slander, charged the utterance of the words, "McK's wife is a whore," it is sufficiently supported by proof of the words, "she (McK's wife) is a whorish bitch."
5. As a general rule, the reputation of a female plaintiff, for chastity, may be assailed, in an action of slander, for words charging a want of it, to reduce the damages, but it is not permissible to direct such proof exclusively to her reputation in that respect, subsequent to the speaking of the slanderous words.
6. Under the plea of not guilty, in an action of slander, the defendant may prove, in mitigation of damages, any thing short of a justification, which does not necessarily imply, or tend to prove the truth of the words charged, but he cannot be permitted to prove facts and circumstances, which conduce to establish their truth, or which form a link in the evidence to make out a justification.
7. A repetition of the words, charged in a declaration in slander, to have been spoken by the defendant, or other actionable words uttered by him, in reference to the plaintiff, after the institution of the suit, are admissible in evidence, as tending to show *quo animo* the words charged were spoken: but where such evidence is admitted, the jury should be instructed, that it is admitted for that purpose alone, and that they are not to give damages for other, than the words charged in the declaration.
8. It is not necessary in an action of slander, that the plaintiff should prove the speaking by the defendant of all the words charged, to entitle him to recover: Proof of a part of them, if actionable of themselves, is all that is required.

Error to the Circuit Court of Cherokee. Before the Hon. Sidney C. Posey.

This was an action of slander, instituted by defendants against plaintiff in error. A sufficient notice of the first count in the declaration, and the evidence adduced under it,

will be found in the opinion of the court. The second count charges the speaking of the words, "McKinnish's wife has been counted a whore:" "is a whore." Plea, not guilty. The words proved as applicable to the second count are, "she is a whorish bitch." The defendant below objected to this proof, but the court overruled his objection. Plaintiffs proved by another witness, words substantially the same as those charged in the first count, with the addition, "they want to law twenty negroes out of me," &c.: which testimony was objected to by defendant, and the objection overruled. Defendant offered to prove, 1st. That in a subsequent conversation with the witnesses who proved the words of the first count, he stated that he had heard these things, and mentioned the name of the person from whom he heard them. 2d. A general report, in the neighborhood, before the utterance of the slanderous words, that Mrs. McKinnish was guilty in the matter charged. 3d. The general character of Mrs. McKinnish, for chastity, since the speaking of the words. 4th. Facts tending to show that the words spoken were true. The court ruled out each, and all of this testimony.

The court charged the jury, that proof of the utterance of the words. "a damned whorish bitch," was sufficient to support the allegation in the second count; to which charge defendant excepted.

The several rulings of the court, above set out, and its charge to the jury, are now assigned as error.

L. E. Parsons and J. B. Martin, for plaintiff.
Woodward, for the defendants.

COLLIER, C. J.—The testimony of the first witness proved, *substantially*, one of the charges which the declaration alleges, in very obscene terms, was made by the defendant against the female plaintiff, and the court properly refused to reject it at the defendants instance. Perhaps the plaintiffs might have objected to the rejection by the court *mero motu*, of a part of this evidence on the ground that the language was too indecent to be used; but this seems to have been acquiesced in by both parties.

It was clearly incompetent for the defendant to show on

the cross-examination of the plaintiff's witnesses, or otherwise, that the defendant, subsequent to the speaking of the words charged, stated that he heard them from another person, whose name he proposed to state. Such testimony would not be the disclosure of declarations which constituted a part of the *res gesta*, but would be to permit a party to exculpate himself by his own *post factum*, statements. Declarations under such circumstances, are inadmissible, both upon principle and authority.

Evidence cannot be received of common report, as to the truth of slanderous words, which the defendant has spoken against the plaintiff, for the purpose of diminishing the damages. A party must find some more substantial apology for injurious imputations against the character of another, than mere idle rumor: it can afford him no aid, and should not be regarded by a jury as worthy of consideration. Kennedy v. Gifford, 19 Wendell's Rep. 296; Lewis v. Niles, 1 Root's Rep. 346; Austin v. Hanchett, 2 Root's Rep. 148; Mapes v. Weeks, 4 Wend. Rep. 659; Anthony v. Stephens, 1 Missouri Rep. 254; Inman v. Foster, 8 Wend. Rep. 602; Cole v. Perry, 8 Cow. Rep. 214; Kellogg v. Cary, 3 Penn. Rep. 102; Smith v. Buckecker, 4 Rawles' Rep. 295; Young v. Bennett, 4 Scam. Rep. 43.

The defendant is charged to have said of the female plaintiff (among other things,) that she "has been counted a whore," "is a whore," &c., and the proof applicable to this charge is, "she is a whorish bitch." *Whore* is the synonym for *a prostitute*, or *a lewd, or incontinent woman; whorish*, means lewd, unchaste, *incontinent*, &c.; and *bitch*, as applied to a woman, is a name of reproach. There is then, if the meaning of the words is to be considered, no material discrepancy between the allegation and the proof. The plaintiff, in the action of slander, cannot recover by proving words, which the witness may regard as equivalent to those he heard the defendant utter; but the witness must state the language that was employed, according to his recollection, so that it may appear to the court whether the cause alleged, is supported. But it is not indispensable that the identical words charged should be proved; it is sufficient to show that the defendant spoke words, *substantially* the same as those stated

in the declaration. Teague v. Williams, 7 Ala. Rep. 844; Easley v. Moss, 9 Ala. 266, does not lay down a different doctrine; but the principle attempted to be extracted, is incorrectly stated in the syllabus of the case; see also Douge v. Pearce, 12 Ala. Rep. 127; Tipton v. Kahle, 3 Watts' R. 93; Hersh v. Ringwalt, 3 Yeates' R. 508; Pursell v. Archer, Peck's Rep. 317; Miller v. Miller, 8 John. R. 74; Cooper v. Marlow, 3 Missouri Rep. 188; Cheadle v. Buel, 6 Ham. Rep. 67; Barr v. Gaines, 3 Dana's R. 258; Treat v. Browning, 4 Conn. Rep. 408. The words alleged, and those proved, are certainly *substantially* the same. Clay's Dig. 538 § 1.

It is certainly allowable for the defendant, in an action of this kind, to assail the plaintiff's reputation for the purpose of reducing the damages, but the inquiry upon this point should not be so extended as to prove the plaintiff's general character has been bad since the speaking of the slanderous words imputed to the defendant. The tendency of an imputation against the chastity of a female, if credited, is greatly to impair her moral standing, and to cast a stain upon her character, and if the party who had charged her with incontinence, were allowed to extend the examination to a time subsequent to uttering the words, he might and most probably would profit by the injury he had inflicted. Hence the court very properly refused to permit the defendant to inquire what was the character of Mrs. McKinnish for chastity after he had imputed to her the want of it.

The fact that Mrs. S. saw her husband and Mrs. McKinnish go to a field together—followed and found them near each other, and drove her husband off by "throwing lightwood knots" at him, we think was not admissible under the plea of not guilty. They tended to establish the truth of some of the most offensive words, alledged to have been spoken, and though they might have had an influence upon the jury in adjusting the damages, they were properly rejected. In Warmouth, v. Cramer, 3 Wend. Rep. 394, it was said, that the defendant, if he had not attempted to justify the charge, may prove under the general issue by way of excuse, any thing short of a justification, which does not necessarily imply the truth of the charge, or tend to prove it true, but which repels the presumption of malice. So in Purple v.

Horton, 13 Wend. Rep. 9, the court refused to permit the defendant to prove in mitigation of damages, facts and circumstances which induced him to believe that the charges which he made were true, where such facts and circumstances tended to prove the charges, or formed a link in the chain of evidence to establish a justification. See Arrington v. Jones, 9 Port. Rep. 139: Root v. King, 7 Cow. Rep. 613; Lamos v. Snell, 6 N. Hamp. Rep. 413; Sawyer v. Eifert, 2 Nott & McC. Rep. 511; Beehler v. Steever, 2 Whart. Rep. 313; Burke v. Miller, 6 Blackf. Rep. 155.

As to the testimony of the last witness examined by the plaintiff, he merely proved the speaking of the words which the first witness narrated with some unimportant additions, and perhaps more precision. But the discrepancy is not so great as to leave room to doubt, that both witnesses referred to the same slanderous imputations, though made at different times. In this view, there is no objection to the testimony of the last witness, and its admission is well warranted by the declaration, which charges the speaking of the words in different forms of expression.

But may not the admissibility of this evidence be defended, upon the ground that it is allowable to show *quo animo* the slanderous words were uttered? The plaintiff may give in evidence, *actionable words* spoken after the institution of the suit, to show the defendant was influenced by malice in speaking those charged in the declaration. Wallace v. Mease, 3 Binn. Rep. 550; Kean v. McLaughlin, 2 Serg. & R. Rep. 469. So a repetition of the words charged may be proved for the same purpose. McAlmont v. McClelland, 14 Sergt. & R. Rep. 359; Williams v. Harrison, 3 Missouri Rep. 411; Bodwell v. Swan, 3 Pick. Rep. 376. So he may prove the speaking of other *actionable words*, even before action brought, for the purpose of showing the malicious intent. Duvall v. Griffith, 2 Har. & Gill R. 30; Howell v. Cheatem, Cooke's Rep. 247; Randall v. Holsenbake 3 Hill's Rep. (So. Ca.) 175; Burke v. Miller, 6 Blackf. Rep. 155. See also Teague v. Williams, 7 Ala. Rep. 844, in which the authorities on the point are collected. But where such words are given in evidence, the jury should be instructed that they are admitted only to show the mind and intent of the defendant when he

spoke the words which are the cause of action; and they should give no damages for any words but those in the declaration.

It is not necessary to entitle the plaintiff to recover, that he should prove the speaking of all the words alledged, if he proves some of them which are actionable without reference to the others, it is quite sufficient. Foster v. Small, 3 Whar. Rep. 138; Scott v. Renforth, Wright's Rep. 55; McKee v. Ingalls, 4 Scam. Rep. 30; Nichols v. Hayes, 13 Conn. Rep. 155; Nestle v. VanSlyck, 2 Hill's Rep. (N. Y.) 282; Chandler v. Holloway, 4 Port. Rep. 17.

This view disposes of all the points presented by the bill of exceptions, and the judgment is consequently affirmed.

LENOIR v. RAINEY.

1. A deed, by which a slave is conveyed to B., in trust, "for the use of M. C., wife of T. A. C., during her natural life, and, after her death, said slave to be the joint property of the heirs of the body of said M. C., vests the entire estate in M. C., and the slave, being reduced to the possession of the wife, becomes the absolute property of the husband.
2. The interposition of a trustee in a deed for the use of a married woman, where the property goes into her possession, and the deed contains no words of exclusion, cannot prevent the marital rights of the husband from attaching upon the property.
3. Where property is found in the possession of a family composed of several individuals, the law refers the possession to him who has the title.

Error to the Circuit Court of Dallas. Before the Hon. N. Cook.

This was a trial of the right of property, levied on under an execution in favor of defendant in error, against one Tho. A. Cargill, and claimed by plaintiff in error. The defendant having made out a *prima facie* case, the plaintiff in error proved, that the property in question, which was a slave, had

been once owned by John M. Cargill, who conveyed it to one Jonathan Brantly, to have and to hold, in trust, "for the use of Martha Cargill, wife of Thomas A. Cargill, during her natural life, and, after her death, said slave to be the joint property of the heirs of the body of said Martha Cargill." Martha Cargill died before the levy, in possession of the slave, and the slave remained in the family of Thomas A. Cargill, consisting of himself, and his children by the said Martha, and was, after the death of said Martha, claimed by the children as their property. The plaintiff in error derived title from the said children, but there was no evidence that they ever had any other title, than that which they claimed to have received through the deed of trust of John M. Cargill.

The court charged the jury, that the deed conveyed to the said Martha Cargill a full title to the slave, and that by possession, the right vested in her husband, and that her children, before or after her death, had no right to the slave. Also, that if Thomas A. Cargill and the children, and the slave all remained together as a family, and Thomas A. Cargill, having the legal title to said slave, the law, as to the plaintiff (in execution) and other creditors, would cast the possession upon Thomas A. Cargill, and not upon the children.

The claimant excepted to these charges severally, and now assigns them as error.

Chamberlayne, for plaintiff in error.

G. W. Gayle, contra.

1. The interposition of a trustee cannot protect the property, any more than if he had not been named. See Lamb v. Wragg and Stewart, 8 Porter, 72.

2. The deed of trust creates an estate tail, thereby destroying all other estates created by it, and vesting the *fee simple* in Thomas A. Cargill, by virtue of his marital rights —said Thomas being defendant in execution. See Clay's Dig. 157, § 37; Harkins v. Coalter, 2 Porter, 463; Dunn v. Davis, 12 Ala. 135. The case of O'Neal et al. v. Teague et al. 8 Ala. 345, cited by plaintiff in error, is different from this. There, the property was to revert, if the wife had no chil-

dren, and this was a contingency which might prevent an estate tail.

3. If the deed does create an estate tail, and the wife is held not to take a *fee simple*, then she died before execution, and the property reverted to the donor, or became the property of the husband *in fee* for want of other disposition, or remainder, or reversion.

4. Lenoir, the claimant, at most, held but a small interest in the slave, and should not be permitted to claim, but enjoin, and sever the interest. As to other interests than his own, he has no right to interfere. In McGrew v. Hart, 1 Porter, 175, it was said, he might interfere, but this case has virtually been overruled by Sample v. Moore, 3 Ala. 319, and Dunn and wife v. Bank of Mobile, 2 Ala. 152.

5. The question of six years' possession is abstract. The evidence shows a joint possession of father and children up to 1837, and the legal title all the while in the father.

CHILTON, J.—The main point involved in this case, was decided in Machen v. Machen, at the present term of this court. It was there held, that a bequest to a married woman, and to her bodily heirs, and if no heirs, to the right heirs of the donor, vested in the first taker, under the rule of construction adopted in Shelley's case, 1 Rep. 93: the absolute estate, and the property having been delivered to the wife, by the executor, vested absolutely in the husband, and upon his death, vested in his executor, and did not survive to the wife.

In the case before us, the slave is vested in a trustee, for the use of the wife for life, and after her death, to be the joint property of the *heirs of the body of the wife.* Had the property conveyed by this deed been real estate, the authorities all agree that an estate tail would have been created. Busby v. Greenslate, 1 Stra. 445; 2 Ld. Raym. 873; 2 Salk. 679; Papillon v. Voice, 1 Pr. Wms. 471. But our statute abolishes estates tail; and it is a general rule, that where the words would raise an estate tail in real property, they will give the absolute title in personalty. 7 Yerg. 519; 9 ib. 232. Indeed, by the common law, no estate tail could be created in personal property. The result is, that the abso-

lute property vested in the first taker, the remainder over to the heirs of the body, being merged in the estate for life. There is nothing in the deed to restrict the words "heirs of the body," to mean, the children of the wife, and by analogy to the rule in Shelley's case, they must be considered as words of limitation, not of purchase. See also Price v. Price, 5 Ala. Rep. 578; 2 Roper on Legacies, 351; 3 Bro. C. Rep. 127; 2 Por. 473.

That the legal estate was attempted to be vested in a trustee, there being no words to exclude the marital rights of the husband, makes no difference. The trustee, after the property was delivered to the wife, had nothing further to do with it. The husband, having the possession, is entitled to all the rights in the property secured by the deed to the wife, and as we have seen the limitation over could not take effect, the absolute proprietorship in the property vested in the husband. The trustee could not sue the husband, and recover upon his title, for he has no right to the possession. Carleton & Co. v. Banks, 7 Ala. Rep. 32; Hale v. Stone, at the last term, and authorities there cited. The legal title in the trustee being impotent as against the husband, it is equally so as against his vendee—otherwise, a perpetual restraint would be imposed by the terms of the deed upon the alienation of the property, which the law will not permit. In such case, it is manifest the trust becomes wholly inoperative. See, as to the intervention of a trustee, Lamb, trustee, v. Wragg and Stewart, 8 Ala. Rep. 73; Carleton v. Banks, and Hale v. Stone, *supra;* Cook v. Kennerly, 12 Ala. Rep. 42. In the case last cited, it is said, "one of the inseparable incidents to the ownership of personal property, is, that it shall be liable for the debts of the owner, and that a restraint upon its alienation is void"—citing, Brandon v. Robinson, 18 Vesey, 429.

It follows, from what we have said, that there was no error in the first charge given. As to the second charge, which was objected to, we think it but asserts the familiar principle of law, that where property is found in possession of the family, composed of several individuals, the law refers the possession to the owner of the title. We do not think the charge was an invasion of the rights of the jury. They were in-

structed hypothetically, "that if Thomas A. Cargill, and the children and slave, all remained together as a family, Cargill having the legal title to the slave, the law as to the plaintiff and the other creditors, would cast the possession upon Cargill, and not upon the children." There was no proof that the children claimed otherwise than under the deed, which we have seen vested in them no title. We must consider the charge in connection with, and as applicable to, the proof, and we cannot say, that it was in any way calculated to mislead the jury. Judgment affirmed.

CHILTON v. PARKS ET AL.

1. A final settlement made by a guardian with the orphans' court, shewing the amount of his indebtedness to his ward, is conclusive alike on the guardian and his sureties, unless they can impeach it for fraud.
2. When the liability of a surety of a guardian, is fixed for the default of his principal, he can claim no exemption from that liability, because the minor might charge a previous surety of the guardian, with all, or some portion of the debt.

Error to the Chancery Court of Benton. Before the Hon. W. W. Mason, Chancellor.

THE material facts of the case, are, that Moses L. Barr was appointed guardian of Julia and Mary Harding, by the orphans' court of Madison, and gave Joseph Laughinghouse and Samuel Harris as his securities, and in February, 1837, being authorized to remove his guardianship to Benton county, he was appointed guardian by the orphans' court of Benton, and gave the complainant, and one Doyle as his securities. His wards having attained the age of fourteen years, appeared before the orphans' court of Benton, and one of them chose N. Parks for her guardian, and the other Benjamin Silman; and the letters of guardianship that had been grant-

ed to Barr, were revoked, and the individuals selected by the wards, appointed. This being done, Barr was cited to make a final settlement of his guardianship; he appeared, and acknowledged that he was indebted to Mary Harding in the sum of $2,682 62, and to Julia, in the sum of $2,927 11: whereupon, judgment was rendered against him, and his securities, by consent, for those sums. But his securities, the complainant and Doyle, had no notice of the proceedings in the orphans' court, and were not present, nor did they give any consent to the rendition of the judgment against them. Execution issued on this judgment, and was levied on the land of Barr, and the complainant being then informed of all the proceedings that had taken place in the orphans' court of Talladega county, was present at the sale, and bid off the land for $2,500, and agreed to assume, and pay the two debts; and for this purpose executed his notes for the whole amount, and also a deed of trust on the land, and other property bid off by him at the sale. He paid no money at the sale.

The bill alleges, that complainant was incapable from drink, of transacting business, and that he had been improperly influenced to give his notes, and deed of trust, to secure the amount due the wards. That Barr had wasted most of their estate, previous to his removal of the guardianship from Madison, and that his securities in that court were liable for his default, and not complainant. The bill seeks to set aside the notes, and deed of trust, and to compel an account between the guardian of the minors, and the administrator of Laughinghouse, who was one of the securities of Barr, in Madison.

The answer of the guardians deny all knowledge of the guardianship in Madison, and deny that complainant was disqualified from drink, or any other cause, from transacting business when he gave his notes, and executed his deed of trust. The administrator of Laughinghouse, alleges, that he has made a final settlement of the estate, and had fully administered it, before he had any notice of any demand growing out of the guardianship of Barr.

The chancellor dismissed the bill, and it is now assigned as error.

RICE & MORGAN, for plaintiff in error.

A. J. WALKER, for defendants.

DARGAN, J.—This bill is filed with a doule aspect. The first is, to cancel the notes and deed of trust, executed to secure their payment, which were given for the amount ascertained to be due from Barr, guardian, to his ward; and if this relief cannot be obtained, then to compel an account between the present guardians of the minors, and the administrators of Laughinghouse, who was the security of Barr for his guardianship in Madison county; and to charge the administration with the amount due by Barr to his wards, on the ground, that Barr had wasted the estate of his wards, previous to his appointment as guardian in Benton connty, and before complainant became his security.

The evidence entirely fails to establish, that the notes, and deed of trust, were executed in consequence of any fraud practiced on complainant. Nor is it shown, that he was incapable, from any cause, to transact business, or incompetent to enter into the contract. This being the case, it is clear that the complainant is not entitled to have the notes, and deed of trust cancelled; for, independent of the consideration that in consequence of the assumption of the debts due by Barr, to his wards, the complainant became the purchaser of the land of Barr, without making any actual payment, he was clearly liable as the security of Barr, for the amount ascertained to be due to the wards.

A security is bound by the admission of his principal, made in the performance of a duty required of him by law; and a final settlement of the accounts of a guardian, made in the orphans' court, showing the amount of his indebtedness to his wards, is conclusive alike on the guardian, and his securities, uless the securities can impeach it for fraud. Williams v. Howell, 4 Ala. 693; Perkins v. Moore, decided at the present term.

The complainant being liable, as security, on the bond of Barr, the settlement in the orphans' court fixed the amount of that liability, and the notes, and deed of trust, being executed in extinguishment of this liability, the complainant is

bound by them, and there is no principle of equity upon which they can be set aside, or cancelled.

The next object of the bill, is to *charge* the administrator of Laughinghouse, with the amount due by Barr to his wards, and which it is alleged was wasted, during the time Laughinghouse was his security, and before the complainant became bound as the security of Barr.

The administrator of Laughinghouse alleges in his answer, that he had fully administered all the assets that came to his hands, as administrator, and had made a final settlement, distributed the estate, and had been discharged from his duties as administrator by the order of the orphans' court, before he had any notice of a demand against him growing out of the guradianship of Barr. But it is contended, that this part of his answer is not responsive to the bill, and should be proved, and as it is not, he cannot claim exemption from liability as administrator.

We do not think it necessary to examine the questions, whether the infant wards, could charge the administrator of Laughinghouse, for any portion of the sum due by their guardian to them, nor whether the defence relied on by him, would avail him, in the absence of proof in support of his answer, if the wards were complainants. For if the administrator of Laughinghouse would be liable to the wards, it would not follow that this complainant could influence this liability for his protection. The complainant is liable for the whole amount due by the guardian to his wards, and he can claim no exemption from that liability, because, under the pleadings, and proof, the infants might charge another with all, or some portion of the debt. (Phillips & Hudson v. Brazeil, 14 Ala. Rep. 746.)

Under no view of the case, is the complainant entitled to relief, and the decree of the chancellor is therefore affirmed.

HART v. TURK.

1. In the trial of an appeal, in the circuit or county court, from a judgment of a justice of the peace, the appellate court is required, by the statute, to try the same, according to the justice and equity of the case, without regard to defects in the warrant, *capias*, summons, or other proceeding of the justice, before whom it was originally tried.
2. On an appeal from a justice of the peace, the amount of the recovery, and not the amount of damages, laid in the declaration, is to be looked to, to show the jurisdiction of the court.
3. Formal defects in pleas in abatement, are reached by general demurrer. The statute abolishing special demurrers, has no application to such pleas.
4. A plea in abatement must be verified by affidavit, where the facts averred, as the *gravamen* of the plea, do not appear on the face of the record, and if not so verified, a demurrer to it should be sustained.
5. The proper course for a plaintiff to pursue, where the defendant pleads at the same time in abatement, and in bar, is to move to strike out the former, or to treat it as a nullity.

Error to the County Court of Conecuh.

The action in this case, was commenced in a justice's court, by plaintiff, against defendant in error. The warrant of the justice requires the defendant to answer to a demand for $99 27. At the trial, a judgment was rendered by the justice, in favor of the plaintiff, for $36 45, from which the defendant appealed to the county court. In the county court, the plaintiff filed his declaration, laying his damages at the sum of $100. The defendant pleaded—"1. That the justice's summons shows that more than $50 were sued for, to wit, $99 27." 2. "That the debt for which the suit was brought, amounted, at the time, to more than $50." 3. The statute of limitations of three years. 4. Non-assumpsit. 5. Set-off. 6. Payment.

The plaintiff demurred to the first and second pleas, but the court overruled his demurrer, and thereupon issue was joined upon all the pleas. It does not appear, from the record, that the pleas which were demurred to, were verified

by the defendant. The ruling of the court is now assigned as error.

WATTS & JACKSON, for plaintiff in error.

1. The demurrer to the first and second pleas should have been sustained, because, in pleas in abatement, matters of form are regarded as substance. The statute abolishing special demurrers, does not apply to pleas in abatement. Elmes & Co. v. McKenzie, 5 Ala. 617.

2. It is the amount of the recovery, and not the sum claimed, which settles the question of jurisdiction. Cothran et al. v. Wier, 3 Ala. 24.

3. Filing the general issue, and other pleas to the merits, waives the plea to the jurisdiction of the court. Wilson v. Oliver, 1 Stew. 46; Tomb. Bank v. Draughan, 1 ib. 66.

4. When a case is moved from a magistrate's court, to the county or circuit court, it must be tried on its merits *de novo*, without regard to any defect in the proceedings before the justice. Carter et als. v. Douglas, 2 Ala. 499; also, Slanten v. Apperson, decided at the present term of the court.

5. The plea to the jurisdiction should have been filed at the time of trial in the justice's court. That objection cannot be made for the first time in the county court. Slanten v. Apperson, *supra*.

No counsel for defendant.

COLLIER, C. J.—The act of 1819, declares, that in cases of appeals from judgments of justices of the peace, the court before which such appeals shall be brought, shall proceed to try the same, according to the justice and equity of the case, without regarding any defect in the warrant, *capias*, summons, or other proceeding of the justice of the peace, before whom the case was tried. We have always considered this a very beneficial enactment, and instead of restricting its terms, have given to them a just and liberal interpretation. Perry v. Brown, Minor's Rep. 57; Gayle v. Turner, ib. 204; Spann v. Boyd, 2 Stew. Rep. 480; Rutledge v. Rutledge, ib. 400; Hagan v. Thompson, 2 Port. Rep. 48; Harrison v.

Dannelly, 5 Port. Rep. 513; Munf v. Harding, 6 ib. 121; McCrory v. Smith, 1 Ala. Rep. 157.

In Cothran et al. v. Weir, 3 Ala. Rep. 24, the damages in the statement filed on appeal to the county court, were laid at $100. This court said, "it is the amount of the recovery, and not the sum claimed, which settles the question of jurisdiction." So in Bentley et al. v. Wright, 3 Ala. Rep. 607, it was held, that an appeal should not be dismissed by the circuit court, because the judgment of the justice of the peace was for a sum beyond his jurisdiction; it was added, that if the defendant controverted the authority of the justice, he should have pleaded in abatement, that the suit was instituted before a tribunal having no jurisdiction of the case.

It has been repeatedly decided by this court, that the act of 1824, abolishing special demurrers, does not apply to pleas in abatement, and that formal defects in such pleas are reached by general demurrer. Elmes v. McKenzie, 5 Ala. Rep. 617; Casey v. Cleveland et al. 7 Port. Rep. 445.

In Coalter v. Bell, 2 Stew. & P. Rep. 358, it was decided, where the facts averred in a plea in abatement do not appear upon the record, an affidavit should be made of their truth; and if they are not verified, a demurrer to the plea should be sustained. See also Olds v. Sargent, 1 Stew. Rep. 37; Caldwell v. Br. Bank Mobile, 11 Ala. Rep. 549.

The proper course for the plaintiff to pursue, where the defendant pleads both in abatement and bar, is, to move to strike out the former, or to treat it as a nullity—as tacitly waived or superseded by a plea to the merits. Wilson v. Oliver, 1 Stew. R. 46; Cleaveland et al. v. Chandler, 3 Stew. Rep. 489; Sadler v. Fisher's adm'r, 3 Ala. Rep. 200.

The first plea alleges, that the summons issued by the justice, shows, that more than $50 were sued for; to wit, $97 27. In the second, it is averred that the amount for which the suit was brought, was more than $50 at the time the suit was instituted. The first plea is defective, if for no other reason, in making the summons, the test by which the question of jurisdiction is to be determined. We have seen, that the defects in the proceedings before the justice, cannot prejudice a trial on the merits in the circuit or county court, and they will not be looked to as furnishing an *indicia* of the

amount sought to be recovered. These remarks are applicable to the second plea, which assumes the want of jurisdiction, by a reference to the sum for which the suit was brought. In addition to these defects, both pleas are altogether objectionable, in not being pleaded with the appropriate beginning and conclusion, as well as the want of an affidavit of their truth. Such a mode of verification is indispensable, as their truth is not affirmed by any part of the record, to which we are permitted to refer. The judgment is consequently reversed, and the cause remanded.

AVERETT v. THOMPSON.

1. When the court has jurisdiction of the subject matter, and renders a judgment, upon which an execution, regular upon its face, issues, it will be a protection to the sheriff acting under it, no matter how irregular the proceedings of the court may be.
2. In the absence of proof, it will be intended by the courts of this state, that the common law is in force in North Carolina.
3. Where an execution issues against T., who is described as the administrator of C., but the sheriff is required to levy upon the goods and chattels, lands, and tenements of T., the property of T. may be taken in execution.

Error to the County Court of Sumter. Before the Hon. Preston G. Nash, Judge.

This was an action of assumpsit, on the common counts only, by defendant, against plaintiff in error. A bill of exceptions, found in the record, discloses the following facts: After the defendant in error had introduced evidence, tending to show, that plaintiff in error had, as his agent, in Onslow county, North Carolina, sold certain property of the defendant, and received therefor the sum of $600, the plaintiff offered proof to rebut this evidence, introduced by defendant, and proved, that the only sale he had ever made of said property, was as sheriff of Onslow county, aforesaid, under an

execution issued from the superior court of Jones county, in the same state, against the defendant in error, and he produced in evidence an exemplification of the proceedings in the cause in which said execution issued, the contents of which, so far as they are necessary to be recited in order to a full understanding of this case, are sufficiently set out in the opinion of the court, except, that the judgment in the exemplification, appears to have been rendered against the defendant in error, for costs in a suit instituted by him as administrator of James Colvert, against one Daniel Thompson, a verdict, on the trial of the case, being given in favor of the latter.

The court below charged the jury, that the execution in North Carolina did not authorize the sheriff to sell the individual property of defendant in error, and that if the plaintiff in error did so, under said execution, he is liable to defendant in error for the proceeds of such sale, unless the latter had assented to the sale.

The plaintiff in error asked the court to charge the jury, that if the plaintiff in error, as sheriff, was not authorized to sell the property under the execution, yet if he did so, and applied the proceeds to the satisfaction of the execution before this suit was brought, the defendant in error could not recover under any count in his declaration. The court refused this charge, and the charge given, and that refused, are now assigned as error.

Bliss & Baldwin, for plaintiff in error.

1. The execution is against William H. Thompson in his individual, and not a representative character, and the words administrator, &c., are merely descriptive, or surplusage. Arrington, adm'r, v. Coleman, 1 Murphy, 103; Brown v. Hicks, 1 Ark. R. 232, and authorities; Sabin v. Hamilton, 2 Ark. Rep. 485; Watkins v. McDonald, 3 ib. 266; Clark v. Lowe, 15 Mass. 476; 4 Bacon's Ab. tit. Ex'rs and Adm'rs, let. O, p. 127-8; 1 Tidd's Prac. 450; 3 Chitty's Prac. 182; Tillinghast's Forms, 190. Judgment generally, or *de bonis propriis*, against an administrator, when it should be *de bonis testatoris*, is error. 2 Lomax on Ex'rs and Adm'rs, 443; 2 Smedes & Marsh. R. 541. It is error, because, on such a judgment, his individual property might be taken.

2. The execution did not issue against the goods, &c. of intestate in the hands of administrator: it did not authorize a levy upon those goods. The judgment, if proper to be looked to, corresponds with the execution.

3. The form of the mandate against the lands, &c. of Thompson, shows, that it was to be levied of his own property.

4. An administrator suing on his own contract, though made as administrator, is, in North Carolina, responsible for costs; and this although he styles himself administrator—this term being merely surplusage. See 1 Murphy, *supra.*

Hoit, contra.

1. In giving this charge, which was superinduced by the charge asked for by plaintiff in error, it became necessary for the court to consider, and pass judgment upon the nature and character of exhibit A, which is not entitled to the character and force of a record from a court of a sister state of the union. It is not authenticated in any manner, consequently, is not entitled to any weight in evidence; nor will it warrant any presumption in its favor, or that the court was one of competent jurisdiction of the subject matter. Clay's Dig. 619; 1 Greenl. Ev. § 506; Ansley v. Carlos, 9 Ala. R. 973; Hudson v. Daily, 13 ib. 723; Crawford v. Simonton, 7 Por. R. 110. It does not possess the necessary requisites for a judicial record—it contains neither declaration, plea, statement of the cause of action, nor judgment. Tombeckbee Bank v. Godbold, 3 Stew. R. 240; Tombeckbee Bank v. Strong's ex'rs, 1 S. & P. 187; Ayres v. Dobson and Hughes, 5 S. & P. R. 441; Mathews v. Moore, 2 Murphy's R. 181; McIlwaine v. Batchelor, 3 Dev. & Bat. R. 52; Polhemus v. Perkins, 3 Green's R. 435; Evans v. Hinds, 1 McMullen's R. 490; Wooster v. Clarke, 2 Pike's (Ark.) R. 101; Baker v. the State, 3 Pike's R. 491. Consequently, the *fi. fa.* was void *ab initio;* for the execution must follow and correspond to the judgment, and here there is no judgment to sustain it. 2 Conn. R. 462; 3 Johns. 523; Mart. & Yerg. R. 45.

2. An administrator is not liable *de bonis propriis* for costs, when he sues as administrator. 1 Murphy's R. 102; 10 Ala. R. 600, and cases cited; 12 ib. 36.

CHILTON, J.—No question was raised in the court below, as to the admissibility of the record, showing a judgment and execution in favor of Daniel Thompson, against the defendant in error, and consequently, no question as to its authentication can be raised here. The only question we need consider, is, whether the record furnished sufficient warrant to the plaintiff in error for making the sale of the slaves.

He was the sheriff of Onslow county, in the state of North Carolina, and the record shows that a writ of *fieri facias*, was placed in his hands, which was regular upon its face, issued from the superior court of Jones county, directed to him, and commanded him as sheriff, "that of the goods and chattels, lands and tenements, of William H. Thompson, administrator of James Colvett, he cause to be made the sum of $247 66 which said Daniel Thompson, lately, in the said superior court of law for the county of Jones, recovered against him, for cost, &c." The record merely shows a writ between the parties; that defendant pleaded the general issue and forgery; that a jury found the issues in favor of the defendant, and then recites, "judgment against the plaintiff, for cost." It does not appear from the exemplification that any declaration was ever filed.

The counsel insists, that the execution was void, as there was no judgment on which it could issue. It is true, the judgment entry is not formal, but it is not necessary for the protection of the sheriff, that he should show a judgment. If the court has jurisdiction of the subject matter, and the execution is regular upon its face, the sheriff has no right to enquire into the irregularity of the proceedings of the court. We must intend that the common law is of force, in the state of North Carolina, where the sale was made, and by that law the rule, as we have above stated it, is well settled. Sheppard et al. v. Nabers, 6 Ala. Rep. 635; 5 Wend. 170; 16 ib. 514; 3 Greenl. Rep. 40; 3 Dev. 468. So in Stephenson v. McLean, 5 Humph. Rep. 332, it was held, that although a sheriff was not bound to execute void process, he is bound to execute process merely irregular and voidable. If he fail to do so, he is liable to the plaintiff, and if he execute it, he is protected.

In Kleissendorff v. Fore, 3 B. Monroe, it was held, that

the sheriff was not bound to look to the judgment, but that the execution was his warrant.

The cases towhich we are referred, by the counsel for the defendant in irror, do not militate against this view, when closely examined. The case from South Carolina, of Evans v. Hinds, where the entry bears some resemblance to this, was a controversy between two purchasers of land, at the sheriff's sale, and it became necessary to show a judgment, in order to make out the title. The case of Reade v. Markle, 3 Johns. Rep. 516, was a controversy between the parties, to irregular process, after it had been declared void, which distinguishes it very clearly from this case. There can, I apprehend, be no question, but that the sheriff in that case, who executed the process and sold the property, for the conversion of which the action was brought, would have been protected.

Upon the other point, as to whether the property of the defendant in error could properly be levied upon, we think it too clear to admit of argument. The mandate of the writ is to levy the amount of his goods ands chattels, land and tenements, describing the defendant in the execution as administrator of the estate of Colvett. That this is but a description of the person, see Peters v. Heydenfeldt, 3 Ala. Rep. 205; and cases cited on the brief of the counsel for the plaintiff in error.

The ruling of the county court, being opposed to the view here expressed, the judgment is reversed and cause remanded.

MARSHALL v. GANTT.

1. A slave was sold with warranty of soundness, and about two months afterwards, received a gun-shot wound in the arm, which tore the flesh, and shattered the bone. Mortification ensuing, the arm was amputated, and in a few days the slave died. The attending physicians, testified, that the

slave labored under a chronic affection of the lungs, which had existed previous to the sale, and but for this disease, in the opinion of the physicians, the wound would not have proved mortal, nor would amputation have been necessary. Held, that the vendor was not liable upon his warranty, although the slave was diseased at the time of the sale, beyond the extent the disease depreciated his value, had he never received the wound of which he died; and was not liable for injuries received by the slave, after the sale, which acting on the system, conjointly with the disease, hastened his death.

2. In an action upon a warranty of a slave, to recover damages for his unsonndness, it is improper to suffer the slave to bo produced by the plaintiff, on the trial, and exhibited to the jury, without the consent of the defendant; and even then, it seems, the court may interpose, and refuse its assent.

Error to the Circuit Court of Dallas. Before the Hon. Nathan Cook.

This was an action by defendant against plaintiff in error, on a breach of warranty in the sale of six slaves. By the bill of exceptions, it appears that about two months after the purchase of the negroes, by defendant in error from plaintiff, one of them by the name of Major received a gun-shot wound in the right arm, between the elbow and shoulder, nearly the whole load passing through the arm, tearing the flesh and shattering the bone: that his attending physicians soon discovered that his lungs were seriously affected: that the wound did not heal, but finally resulted in mortification, which rendered it necessary to resort to amputation, and that in two days after his arm was amputated, he died. His physicians gave it as their opinion that his lungs were diseased at the time of the sale, and that but for that reason, he would have recovered from the wound. The plaintiff in error objected to the testimony in relation to the wound, but the objection was overruled by the court. The charge of the court on the above state of facts, is set out in the opinion of the court.

Testimony was introduced by defendant in error, tending to show unsoundess in another of the slaves, at the time of the sale, and in the course of the examination of the physician on the subject, the court ruled, that the witness might give his opinion of the disease of the slave, and in doing so, he might look to the history given by the slave of the case, whilst making his medical examination, so for as that

history corresponded with the symptoms, but that the history itself which the slave gave of the case was not admissible testimony: to which ruling of the court, the plaintiff in error objected.

This last slave was produced before, and exhibited to the jury, in opposition to the objection of the defendant in error, whose objection the court overruled.

The charge of the court, in respect to the slave Major, and its several rulings as to the evidence, are now assigned as error.

G. W. Gayle, for plaintiff in error.

1. The court erred in allowing evidence to go to the jury, of a gun-shot wound subsequent to sale of Major. 1. Such evidence was irrelevant, and served only to confuse the jury. 2. It lead to a suspicion that Marshall, the defendant below, shot him, and prejudiced the jury against him.

2. Also in charging that the jury must find the whole value of the slave Major, if disease was the remote cause, and the gun-shot wound the immediate cause, of his death. 1. If the negro had not been shot, the unsoundness might not have reduced the value $50; for until shot, he was to all appearances a sound negro. 2. It departed from the rule of determining damages in such cases. See Hagan v. Thorington, 8 Porter, 428; Kornegay v. White, 10 Ala. 255.

3. The court below erred in allowing the slave Jenny to be presented to the jury, and inspected by them. 1. If such is the law, a plaintiff in such a suit can always practice a fraud upon the jury, by preparing a slave with a sickly appearance for exhibition. 2. If such a doctrine is tolerated, it will frequently lead to obscenity unbecoming a court of justice—a slave may be stripped and examined, or a horse led into court.

J. W. Lapsley, contra.

1. The charge as to the unsoundness of Major, and the measure of damages, was clearly right. If the unsoundness caused the death, how could it help the seller, that some accidental cause accelerated his death? The jury were required to be satisfied, from the evidence, that the death resulted

from unsoundness existing at the sale, and not from the wound. Williamson v. Cannady, 3 Iredell, 349; Cary v. Gruman, 4 Hill, 625; Story on Sales, § 354.

2. The exhibition of the woman Jenny was proper under the evidence, showing, that long before, at, and shortly after the sale, her appearance and condition were the same, as when she appeared before the jury. Indeed, it would not have been improper, without that evidence. In criminal cases, instruments with which wounds have been inflicted, and cut garments, are often exhibited to the jury. In Colt's case, in New York, a scull was brought in, and pistols fired at it, and divers experiments performed in presence of the jury. In will cases, and also in cases of nuisance, juries personally inspect the premises. I can see nothing in principle, nor find any thing in authority, opposed to such evidence; while it is supported by analogies, and reason. The evidence of the real condition of the negro, was rendered more certain and palpable, by her presence before the jury.

DARGAN, J.—The testimony conduced to show, that Major, one of the slaves warranted to be sound, about two months after the sale, received a gun-shot wound in his arm, between the elbow and his shoulder, which tore away the flesh, and shattered the bone. Physicians were called in, and the wound dressed, which was not considered dangerous: it however did not heal, and mortification ensuing, the arm was amputated. The slave died in a few days afterwards. The physicians testified, that they believed the slave labored under a chronic affection of the lungs, at the time of the wound, which had existed for some time before the injury was received, and for more than two months previous; and but for this disease, the wound would not have proved mortal, nor did they think it would have been necessary to amputate the arm. The slave, however, had been able to attend to ordinary business, previous to the wound, and it does not appear that his disease had attracted attention before that time. The court charged the jury, that if they believed, from the evidence, the slave was diseased at the time of the sale, and that the disease continued until the wound was received, which of itself was not mortal, but that the slave would have reco-

vered from the wound, but for the disease; and if they believed the real cause of his death, was the disease, although his death was accelerated by the wound, then they should find for the plaintiff, the value of the slave at the time of the sale, deducting therefrom the value of his services, from the time of the sale until his death.

In an action for the false warranty of a slave, the plaintiff is entitled to recover, to the extent the slave is impaired in value, by the disease existing at the time of the purchase. Hagan v. Thorington, 8 Porter, 428; Kornegay v. White, 10 Ala. 255. But the warranty cannot extend to diseases contracted after the sale, nor to wounds, or injuries casually received. The charge of the court, however, subjects the defendant to responsibility for the results of the wound, as well as the disease, and holds him equally liable, although the death of the slave was accelerated by the wound. In this the court erred. The defendant is liable, if the slave was diseased at the time of the sale, and warranty, *to the extent only, that this disease lessened his value*, and the court should have left it to the jury, under all the proof, to ascertain, first, whether the slave was diseased at the time of the sale, and if they found that he was, then to ascertain to what extent this disease depreciated the value of the slave, had he never received the wound. This is the extent of the defendant's liability, because his warranty extends no further. He does not undertake to be responsible, if his death is accelerated by wounds, or other diseases, contracted after the sale; but it is limited to the diseases existing at the time of the sale, and the measure of this liability, is, to the extent that the slave was deteriorated in value by the disease. He cannot be held liable, for injuries received afterwards, which, acting on the system, conjointly with the disease, hastens his death.

This is the only error we can discover, in the record. The ruling of the court, in reference to the other slaves, alleged to be unsound, was correct; nor can we say, there was any error in regard to the testimony. We will however remark, that the practice of producing the slave before the jury, should not be encouraged. A jury, who are not supposed to be medical men, nor acquainted with the nature, and charac-

ter of disease, may often be misled, by the appearance of the slave. The impropriety of it is still more apparent, by reflecting, that the defendant has not the power to compel the plaintiff to bring the slave before the jury. If his appearance would make in favor of the defendant, the plaintiff may not let him appear before them. If, however, the plaintiff should think the presence of the slave would be favorable to him, he can bring him into court for this purpose. We think it the safer practice, not to permit the slave to appear in court, and be exhibited to the jury, unless both parties assent to it, and then, even, the court may refuse to permit it to be done. This is the first time the question has ever been raised in this court, or in any other, that I can discover. We do not see that the defendant was injured by it, in this particular case. But the practice may lead to injurious results, to the rights of defendants, and it should not be allowed to spring up. For the error we have noticed, the judgment must be reversed, and the cause remanded.

KELLY v. SMITH.

1. Upon the application of a minor, who has arrived at the age of fourteen years, the orphans' court is authorized to appoint such guardian as the minor may elect, *without notice* to the guardian previously appointed.

Error to the Orphans' Court of Lowndes. Before the Hon. Edw. H. Cook, Judge.

This was an application of Harriet E. Teams, a minor, over the age of fourteen, to appoint John N. Smith, the defendant in error, her guardian, in the place of the plaintiff in error, who had formerly been appointed by the court, before, under the statute, she had the right of election. The court granted the application, and made the appointment without notice to plaintiff, and this is now assigned as error.

J. B. Stone, for plaintiff in error.

1. A guardian may be removed for any good and sufficient cause; but is entitled to fourteen days' notice, to appear and show cause why he should not be displaced. Clay's Dig. 268, § 4.

2. There is only one instance in which the court can remove a guardian without notice, and that is where he is charged with a breach of duty, or it is made to appear that he has removed from the state, &c. Clay's Dig. 221, § 5; Speight v. Knight, 11 Ala. R. 464.

T. J. Judge, contra.

1. Under the act of 1806, (Clay's Dig. 268, § 4,) "a practice has grown up, after citation to the guardian, to file specifications setting forth particularly the causes alleged for displacing the guardian." Huie v. Nixon, 6 Por. 81. These specifications should not only particularly, but with that certainty required in pleading, set forth these causes. The third spefication of plaintiff in error, in the court below, was too vague and indefinite; consequently, the demurrer thereto was rightfully sustained. And the plaintiff having failed to make good by proof, or even to attempt it, the first and second specifications, the court below rightfully dismissed the proceeding.

2. But taking the whole transcript as the record proper of the proceeding below, and still the court did not err; for the act of 1806, (Clay's Dig. 267, § 1,) authorizes minors over the age of fourteen years, to select their guardians; and the selection may be made before the judge of the orphans' court, or a justice of the peace. This act allows a free choice on the part of the minor, without requiring any cause or reason to be assigned for the selection; and a proceeding under it does not come under sec. 4, Clay's Dig. 268, which requires fourteen days' notice to an existing guardian, before he can be removed for cause, by the court; for whence the necessity of notice, when no cause is required, nor can be shown for displacement; and, when the court does not displace, but the ward does, by the selection of another?—Speight v. Knight, 11 Ala. 461, is not in opposition to this.

3. It is the duty of the orphans' court judge, on such se-

lection being made by a minor, to be satisfied that the person chosen is one suitable and proper for the trust, that the selection is free and voluntary, and that the minor is over fourteen years of age. It is to be presumed, that that duty was performed in this instance, for plaintiff failed to show, in the court below, any undue influence, or improper conduct, in causing the selection of defendant, and even solemnly admitted in the petition, that the minor was over fourteen years of age.

COLLIER, C. J.—"The judge of the county court of the county in which such judge resides, is empowered and required, to take, receive and admit all accounts of executors, administrators and guardians, &c.; to appoint guardians to minors, of their own election, &c." Clay's Dig. 226 § 27. So when, and as often as there shall be occasion, he is empowered "to allow of guardians that shall be chosen by minors of fourteen years of age, and it shall be lawful for the said court to appoint guardians for such as shall be within, or under that age." Clay's Dig. 267 § 1. Guardians are required to give bond with surety for the faithful execution of their trust, to return an inventory of the estate of their wards, to exhibit their accounts, &c. "Any guardian who shall not deliver in such inventory, or render such account, shall, by order of the orphans' court, to which he is answerable, be summoned, and if he remain in default, compelled to perform his duty, or be displaced. And the said court may for any good and sufficient cause, displace a guardian, giving such guardian fourteen days previous notice, by citation, to appear and show cause why he should not be displaced." Clay's Dig. § 2, 3, 4.

These are all the statutes which are at all pertinent to the case before us. There is certainly nothing in the language in which they are expressed, requiring a notice to be given to the guardian elected by the orphans' court, for an infant of tender years, in order to authorise the allowance of such guardian, as the infant may choose upon attaining the age of fourteen years. The appointment of the court can interpose no objectian as *a matter of right*, to the choice of his ward, if the ward has arrived at that age which entitles him to

choose a successor. Here it is explicitly conceded in the petition, that there is no objection to the allowance of the second guardian, upon the ground of want of age. The act which directs that fourteen days notice shall be given to a guardian before the court shall displace him, applies in terms to a case, where he is attempted to be divested of his trust for some *good and sufficient cause:* as malversation, neglect, &c. So the provisions, in respect to non-resident guardians are alike inapplicable. It is only necessary carefully to examine our legislation upon this subject, to convince the judgment that these conclusions are an obvious result of our legislation. The choice of the minor of fourteen being allowed, the previous appointee of the court is tacitly superseded, and may be required to settle his accounts.

No question is raised upon the other points made by the petition and specifications, and we have but to declare that the judgment of the orphans' court is affirmed.

TURNER AND WIFE v. ESSELMAN.

1. A decree in bankruptcy, will not protect the surety of a guardian of a minor, on his official bond, against a statute judgment obtained against him as such surety, by the return of no property to an execution against his principal, though made after he obtained his decree in bankruptcy.

Error to the County Court of Lowndes. Before the Hon. Edward H. Cook, Judge.

The facts all appear in the opinion of the court.

J B. Stone, for plaintiff in error.

1. When execution shall have issued against any executor, administrator, or guardian, and shall have been returned "no property found," execution shall forthwith issue against

the securities of such executor, administrator, or guardian. Clay's Dig. 335.

2. The debt sought to be enforced and collected by the execution, is a fiduciary debt, and comes within the express exceptions of the bankrupt act. See bankrupt law of 1841, sec. 1.

3. A construction cannot be given to the act of bankruptcy of 1841, so as to annul, destroy, or impair any lawful rights of married women or minors, &c., which may be valid by the laws of the states respectively. Bankrupt law, 3d proviso, 2d sec.

4. The replications of the defendant in error, to the pleas, should have shown that the plaintiff's debt is not of the class mentioned in the first section of the bankrupt act, as having been created in consequence of a defalcation as a public officer, or as executor, &c. Maples v. Burnside, 1 Denio's Rep. 392.

T. J. Judge, contra.

1. It was irregular in plaintiffs in error to plead to defendant's petition: defendant was the actor, and the burden of proof rested upon him, to shew good cause for quashing the levy. Wilson v. Auld, ex'r, 7 Ala. 302. And plaintiffs in error having demurred to defendant's replication, the demurrer should have been visited upon his plea, they being faulty, as well as irregular. The demurrer too. was not to each replication separately, but to both jointly; so that, if either one be good, there was no error in the ruling of the court on the demurrer.

2. But all questions arising upon the pleadings, were settled or waived, by the subsequent conduct of the parties: there was no controversy about the facts; and the judgment entry shows, that by consent, the law was pronounced on facts agreed. So that if the replications, or either one, be not good, plaintiffs were not injured thereby.

3. The court below did not err in its final action. The defendant had been discharged in bankruptcy, previous to the rendition of the decree, and the return of no property found, on the execution against Caffey. Defendant's liability, on the guardian bond, was not in a "fiduciary capacity"

—he being the surety thereon merely. "The fiduciary capacity spoken of in the bankrupt law, is a trust proper." 7 Ala. 335. By defendant's discharge, he was absolved from all his debts, engagements, and contracts, whether absolute or depending on some future contingency; and '*all sureties*' are specially provided for in the act. Bankrupt law, sec. 5; Kyle & Gunter v. Bostick & Sherrod, 10 Ala. 589. And the 3d proviso of the 2d section of the act, has no application to the case at bar: the character of the section to which the proviso is attached, shews this; besides, the rights there reserved to married women and minors, are "not to be inconsistent with the provisions of the second and fifth sections of the act." See 2d and 3d proviso's B. L.

4. The act of the court, in quashing the execution, &c., instead of the levy, was a mere act of supererrogation. McDougald v. Reid and Talbot, 5 Ala. 812.

CHILTON, J.—The defendant in error exhibited his petition, and obtained a writ, superseding an execution, which issued from the county court of Lowndes, against him and Hugh P. Caffey, on the 20th October, 1847. The petition proceeds upon the ground—1. That there was no judgment against the petitioner, upon which an execution could issue. 2. That if such judgment did exist, petitioner was discharged from its obligation, by a discharge in bankruptcy, &c.

Upon the trial of the *supersedeas*, informal and vicious pleadings were had, and several points saved upon demurrers, but it is unnecessary to notice them, inasmuch as the parties, having spread the whole facts upon the record, consented that the court might render a judgment upon them, without the intervention of a jury. As neither party was injured by the mispleading, it cannot be urged as a ground for injured. We will examine the main, and indeed the only question, in the cause, viz., whether the judgment of the court is sustained by the facts set out in the record.

The facts are briefly these: It appears, that on the 15th November, 1830, Hugh P. Caffey having been appointed guardian for Theodosia Ann Reddick, one of the plaintiffs in error, now the wife of Turner, entered into bond with one Seymour Powell, and the defendant in error, as his securities,

for the faithful performance of his duties as such guardian; which bond was conditioned, payable, and approved as the law directs. Afterwards, said guardian returned to the orphans' court an account current with his ward, by which he acknowledges to be due her, and in his hands, on the 1st January, 1834, the sum of $242 92. In July, 1845, the court ordered a citation to issue at the instance of the ward, who had intermarried with Turner, requiring the said Caffey, as guardian, to appear at a time and place therein designated, and make a final settlement of his said guardianship. He failed to appear, and after repeated efforts to procure his personal attendance, the county judge proceeded, under the statute, to state the account, and to render final judgment against him. This judgment was rendered on the 4th February, 1845, for the sum of $469 68, and on the 3d day of January, 1846, an execution issued upon it, which was duly returned "no property found." Thereupon, the execution which was superseded, and which the court below quashed, was issued.

The defendant in error produced and read the certificate of his discharge in bankruptcy, issued by the district court of the United States, for the southern district of Alabama, and which dated the discharge from his debts, &c., from the 23d day of December, 1842. This was all the proof; and the case turns upon the effect of the bankrupt's discharge; for under our statutes, the execution properly issued, and should not have been quashed, or superseded, as to the defendant, unless it was upon the ground of his bankruptcy.

It is settled, by the decisions of this court, that where an execution is attempted to be enforced against the bankrupt, he may avail himself of his discharge, by superseding and quashing the execution. Mabry et al. v. Herndon, 8 Ala. R. 848; Cogburn v. Elliot and Spence, at the present term. The execution creditor may impeach the discharge for fraud, or show that the demand is of such character, as takes it without the operation of the certificate of discharge. In this case, the latter defence is relied upon.

By the last clause in the second section of the bankrupt act, it is provided, "that nothing in this act contained shall be construed, to annul, destroy, or impair any lawful rights of married women or minors, or any liens, mortgages, or other

securities on property, real or personal, which may be valid by the laws of the states respectively, and which are not inconsistent with the provisions of the second and fifth sections of this act." In the case before us, the guardian's bond, although payable to the county judge, is nevertheless for the benefit of the infant ward. She is the beneficiary, and entitled to execution upon it after a return of *nulla bona* to an execution upon a judgment against her guardian. Can this right be taken from her, by the discharge of the surety? To hold that it can, is "to construe" the bankrupt act so as to destroy her right, the enjoyment and assertion of which, do not conflict with any thing contained either in the second, or fifth sections of the act.

The fourth section does indeed declare, that the bankrupt's discharge shall be "from all his debts" and that the certificate of discharge, when duly granted, "shall in all courts of justice be deemed a full and complete discharge of all debts, contracts, and other engagements of such bankrupt, which are provable under this act, &c;" but the general provisions are expressly limited by the proviso, which extends to the whole act: "*nothing in this act contained* shall be construed to annul, destroy or impair any lawful rights of minors, &c."

This language is plain and unambiguous, and needs not the aid of construction. It certainly cannot be restricted to would perhaps, have been the just and legal construction of the exemption of infants from commissions of involuntary bankruptcy. This the act, had no such provision been inserted. See 9 Bing. Rep. 365; 3 C. & P. 283; 14 Ves. Rep. 603; 4Camp. R. 164; 15 Wend. R. 64; 4 ib. 403; 6 Taunt. R. 106. So neither could a married woman be declared a bankrupt, except perhaps, in cases where she carried on business as a *feme sole*, and was responsible as such. La Vie v. Philips, 1 W. Black. 570; 8 Johns. Rep. 72; 18 ib. 141; 1 Dessaus. R. 454; 8 Term R. 546; 7 Bing. Rep. 762; 3 Burr. 1776.

We have been unable to find, by the examination which we have made of the books, any adjudicated case, construing the clause in question, as respects the rights of married women, and minors; the absence of authority on the point, goes far to show that the construction contended for, by the counsel for the defendant in error cannot be sustained, and

that the framers of the act meant what they said, that such rights should remain, neither annulled, destroyed or impaired, by any thing contained in the statute.

The discharge only operates upon such debts, contracts and engagements as are provable under the act; and it would seem to be but a reasonable conclusion, that while such debts, &c. as were not provable, should not be barred or discharged, neither should such claims as are due to persons incapable of proving them, be discharged. In many cases it might have occurred, that infants were wholly incapable of proving their demands or protecting their interest; and to have defeated their rights by a proceeding, in the benefits of which they could not participate, or which, for want of capacity, if improperly instituted, they could not avoid, would be manifestly unjust. This conclusion would seem to derive additional force from the fact, that liabilities for defalcations, as executor, administrator, guardian, &c., cannot be discharged. In such cases it most usually happens, that the rights of married women and minors are involved. In exempting their rights from the operation of the statute, congress did no more than is usually done in the statutes of limitations, non-claims, &c., and but affirmed the wholesome and just principle that no one should be deprived of his rights, by judicial evidence, who is incapable of appearing and protecting them.

This view is conclusive of the case before us, and it becomes unnecessary to examine the other question raised, whether the engagement of the defendent in error was of such a nature, as could have been proved under the decree.

Until the guardian made default, there was certainly no demand which was provable against the surety, and I apprehend, it was hardly contemplated by the act, that the court granting the discharge, should institute an inquiry as to the extent of the principal's default. This would, in many cases, be impracticable, and would have rendered the law in such cases, nugatory by involving the court in inextricable difficulties and delays. But as it is unnecessary to decide the question, we will leave it open. See however, Dyer v. Cleaveland, 18 Verm. Rep. 241; Crouch v. Gridley, 6 Hill's Rep. 250.

The certificate of dicharge being the only ground of defence attempted to be set up by the proof, did not authorise the court, as against the ward, to supersede the execution: the judgment must be reversed and the cause remanded. The parties in the primary court should have leave to amend their pleading. The mode of proceeding in such cases is sufficiently indicated in Mabry, Giller & Walker, v. Herndon, 8 Ala. Rep. 848; Shearer v. Boyd, 10 ib. 281; Spence & Stinnett v. Walker, 7 ib. 568; ib. 302.

DARGAN, J.—I fully concur with the court, in reversing the judgment, because I do not consider that the debt was provable under the bankrupt act, at the time the defendant in error was declared a bankrupt; and for the further reason, that the debt due from the guardian to his ward, was of a fiduciary character, and therefore not affected by the act. But I am not of the opinion expressed, that the bankrupt act does not affect debts due to married women, or minors. I think all debts, whether due to married women, or minors, are discharged by the certificate of bankruptcy, unless they be of a fiduciary character.

CARTER v. DARBY.

1. Admissions, or declarations, which have not been acted on by another, nor been productive of injury to him, do not estop the party making them, from showing the truth to be otherwise.
2. If D., on a good consideration, promises W. to pay a sum of money on a note made by W. and C. as his security, to a third party, C. has no right of action against D., upon the failure of the latter to perform his promise to W.

Error to the Circuit Court of Pike. Before the Hon. Geo. Goldthwaite.

This was an action of assumpsit for money paid, laid out, and expended, and also for money had and received, brought

by the plaintiff against the defendant. On the trial, it appeared, that the plaintiff and defendant, and two others, were securities on a note for $500, for one White, which was given to the Branch Bank at Montgomery. After the note fell due, White made a parol contract with the defendant, Darby, for the sale of one hundred and twenty acres of land, in consideration of which, the defendant agreed to pay on the note $400. The defendant told Boyd and Stewart, the other securities, that he had bought the land, and was to pay $400 on the note. White, the principal in the note, and Stewart also, informed the plaintiff of the sale to the defendant. The defendant took possession of the land, and occupied it two years, but was not in possession, at the commencement of this suit. It was also shown, that the legal title, to eighty acres of said land, was in the defendant, but the equitable title was in White, and the legal title, to the other forty acres, was in another person, and had never been conveyed to the defendant. At the time of said parol agreement, White was insolvent. Under this evidence, the court charged the jury, that the contract of sale was void, and did not bind the defendant to pay the $400.

The defendant requested the court to charge the jury, that if they believed, from the evidence, that the defendant had told Boyd and Stewart, the other co-sureties, that he had bought the land, and was to pay $400 on the note, and that Boyd and Stewart had informed the plaintiff of the sale, and he had been lulled into security thereby, and had taken no measures to secure himself, then the defendant was estopped from alleging, that the sale was void; which the court refused, and charged the jury, that he was not estopped, unless he had made the promise to the plaintiff to pay the amount of $400 on said note.

To the charges given, and to the refusal to charge as asked, the plaintiff excepted, and now assigns them as error.

Buford, for plaintiff in error.

1. Admissions which others have acted on, conclude those making them, and it matters not, if not made directly to the party prejudiced. 1 Greenl. (3d ed.) § 207; Robertson v.

Coker, 11 Ala. 467, and many cases there cited; Brown v. Isbell, ib. 1010.

2. The fact of the legal title to a part of the land being in Darby, (defendant) it is thought distinguishes this from the cases in 8 Ala. 138; 2 Ala. 359; 7 Ala. 347; ib. 129; Johnson v. Hanson, 6 Ala. 351; and most of which conflict with Meredith v. Naish, 3 Stew. 209.

3. The exclusion of the parol evidence of the sale by Darby of a part of the White land, is not waived in assignment of error; we had no possession of the deed, or right to its possession.

HARRIS, contra.

DARGAN, J.—It may be conceded, that inasmuch as the defendant had abandoned the possession of the land, the *contract was annulled, as it was not reduced to writing:* and if the suit was in the name of White, the vendor, on the promise to pay $400, a recovery could not be had. But it is contended, that the admissions made by the defendant, that he had bought the land, and was to pay $400 on the note, operates as an estoppel against him, in favor of the plaintiff, and that he cannot be permitted to show, that the contract was void, and thereby avoid a recovery in this suit. Admissions, which others have acted on, conclude those who made them, and they are estopped, from asserting the truth to the contrary. 1 Greenl. Ev. 207; 2 Starkie, 18. This rule of law is founded on public policy, and accords with sound morality; for if one, by his own admissions, induces another to do a certain act, which he would not have done, if such admissions had not been made, it would be repugnant to justice, to permit the party, after the act is done, to deny the truth of his own admissions, to the injury of the other. So, in the case at bar, had the defendant admitted, before the execution of the note, that he had purchased the land of White, and was to pay on this note $400, he would be precluded from showing, that the contract of sale was void, or that he was not bound to pay it.

But I do not understand, that admissions, or declarations, which have not been acted on by others, nor been productive

of injury to them, can preclude the party making them, from showing the truth to be the contrary. It is not a breach of good faith, nor contrary to public justice, for a party to controvert the truth of his admissions, if they have not influenced the conduct of others, nor been productive of injury to them. 1 Greenl. Ev. § 209. Applying these rules to the case before us, we can perceive no error in the record. The note was executed by the plaintiff, before the defendant stated, that he had bought the land of White, and was to pay $400 on the note; nor is it shown, that these admissions had any influence on the plaintiff, in preventing him from pursuing a course of conduct, that would have enabled him to protect himself, by obtaining security from White; indeed, it is shown, that White was insolvent at the time the admissions were made. They neither induced the plaintiff to do, or not to do, any act, nor do we see that they have in any manner injured him.

But it would be difficult to perceive how the plaintiff could maintain this action on the promise of the defendant, as shown by the proof, even if it was a binding contract. The promise was made to White, that he would pay $400 on a note held by the bank at Montgomery, to which White was principal, and the plaintiff, and others, were securities. In Huckabee v. May, 14 Ala. 263, the debtor of Huckabee sold to May his property, and May stipulated, that he would pay the debt to Huckabee; we held, that Huckabee could maintain a suit for money had and received, and that May must be considered as having so much money for his use. So, if the bank had been informed of this contract, and had assented to it, by bringing the action, a recovery could have been had, if the contract had been obligatory; but is very clear, that the plaintiff could not sue on this promise, at the time it was made, for at that time, White was not indebted to him, and no cause of action accrued to him, when the promise was made; nor can he be substituted to the right of action of the bank, by paying the debt, or which White had, if *he* had paid the debt to the bank. The rules of pleading require, that the action shall be brought in the name of him to whom the promise was made, or in whom, the legal right of action is vested. The promise was not made to the plaintiff, nor did

the consideration move from him, and he cannot be substituted, at law, to the right of action of another.

There is no error in the ruling of the court, and the judgment must be affirmed.

PEARSON & FANT v. THOMASON.

1. If a creditor agrees, with his debtor, to accept, in discharge of the debt, a less sum *in money*, than the debtor owes, on an over-due note, and the latter pays the sum of money so agreed, but the note is not delivered up, it is a *nude pact.*, and cannot bar a recovery of the balance due on the note.
2. In determining, whether an agreement by a creditor to accept from his debtor a less sum, than he owes, in full satisfaction of the debt, is without consideration, the insolvency of the debtor, at the time, can have no influence. His *obligation* to pay is not impaired by his insolvency.

Error to the Circuit Court of Talladega. Before the Hon. Nathan Cook.

This was an action by plaintiffs against defendant, on a promissory note for $132 82, dated 26th January, 1842, at one day after date. It was in proof, that in the month of November, 1843, Pearson, one of the plaintiffs, told the defendant, who was then insolvent, that if he would pay him twenty-five dollars in money, they would strike off even, and commence anew: the defendant then went into an adjoining room, and returned with the money, which he handed to Pearson. Whilst defendant was out of the room to get the money, Pearson remarked to a person who was present, that it was all he would ever get any how, and that if he got that, he would be satisfied; and when defendant returned and handed him the money, he said to defendant, that they were even up to that time. There was no evidence that any note was given up to defendant, but a witness testified that the settlement had reference to all the demands that Pearson held against the defendant. The plaintiffs' counsel request-

ed the court to charge the jury, that if they believed the testimony, the payment of $25 by defendant to Pearson, one of the plaintiffs, was no satisfaction of their demand. This charge the court refused to give: but charged the jury, that if the defendant was really insolvent at the time, and Pearson, by this arrangement, obtained twenty-five dollars from him, when without the arrangement, he would have got nothing, then the payment of the twenty-five dollars would be a satisfaction, and in that event they must find for the defendant. To the refusal of the court to charge, as requested, and to the charge given, the plaintiffs excepted, and now assign them as error.

L. E. Parsons, for plaintiffs.

The acceptance of a less sum, cannot be a satisfaction in law, of a greater sum *then* due. Fitch v. Sutton, 5 East, 230; 4 Gill & Johns. 305; 1 Str. 426; 2 Johns. 449; 20 ib. 78; 5 ib. 271; 9 ib. 323; 17 ib. 174; 2 Lit. 49; 4 ib. 242.

Rice & Morgan, contra.

1. The consideration of the plaintiffs' agreement to take $25 in discharge of the debt, is shown by the proof, to have been Thomason's insolvency; and the full expectation, on the part of the plaintiffs, that they would never get any thing but the $25; and for this reason the first charge was properly refused, and second charge was properly given. The first charge called upon the court to decide what the depositions proved. The charge was properly refused, because it put the whole case on the proof contained in the deposition.

2. An agreement to accept a smaller sum, in discharge of a larger demand, is *nudum pactum;* but the acceptance of a smaller sum, or even an agreement to accept, a smaller sum, is good, in discharge of the debt, if there be any benefit, or even a legal possibility of benefit to the creditor thrown in; that additional weight will turn the scale, and render the consideration sufficient to support the agreement; as in this case—the insolvency of Thomason, at the time the $25 was taken. 2 Camp. 124, 383; 3 ib. 175; 11 East, 390; 2 Starkie, 417; 6 Ala. 619.

COLLIER, C. J.—The only question which it is neces-

sary to consider, is, whether, if a creditor say to his debtor, who is in insolvent circumstances, if he will pay a designated sum, not more than one-fifth of the debt, he would accept it in full satisfaction, and the debtor thereupon pay the sum named, can the creditor maintain an action against him for the recovery of the residue ?

In Steinman v. Magnus, 11 East's Reports, 390, Lord Ellenborough said, "It is true, that if a creditor simply agree to accept less from his debtor than his just demand, that will bind him : but if upon the faith of such an agreement, a third person be lured in to become surety for any part of the debt, on the ground that the party will be thereby discharged of the remainder of his debts ; and still more when in addition to that, other creditors have been lured in by the agreement, to relinquish their further demands, upon the same supposition, that makes all the difference in the case." He said it would be a mixed question of law and fact to go to the jury, whether after the plaintiffs had entered into the composition in conjunction with the other creditors, it were not a fraud upon those persons to endeavor to obtain a further payment from the defendant, whom they all proposed to liberate upon the terms of the agreement. All the cases cited for the plaintiff in error belong to the same class, and lay down the law in equivalent terms. See Fitch v. Sutton, 5 East's R. 230 ; Cockshott v. Bennett, 2 Term Rep. 763 ; Frise v. Randall, 6 ib. 146 ; Smith v. Stone and Mullikin, 4 Gill & J. Rep. 310; Bullen v. Gillicuddy, 2 Dana's Rep. 92; Russell v. Rogers, 10 Wend. Rep. 473. It is said to be well settled, that the payment of a less sum of money than the whole debt, *without a release*, is no satisfaction of the plaintiff's claim. And a mere agreement to accept less than the real debt is *nudum pactum*. Cumber v. Warn, 1 Stra. Rep. 426; Harrison v. Wilcox, 17 Johns. Rep. 169 ; Boyd v. Hitchcock, 20 Johns. Rep. 76 ; Geiser v. Kershner, 4 Gill & J. Rep. 305 ; Jones v. Bullitt, 2 Litt. Rep. 49 ; Allen v. Roosevelt, 14 Wend. Rep. 100 ; Fellows v. Stevens, 24 ib. 294. But an acceptance by a creditor of a less sum than the amount of his demand, in full satisfaction of the debt, if made before payment is due, or in the notes of a third person, it has been held will be a good discharge. Goodnow v. Smith, 18 Pick.

Rep. 314; Brooks v. White, 2 Metc. Rep. 283; Booth v. Smith, 3 Wend. Rep. 66; 3 Hawkes' Rep. 580; Jones v. Bullitt, 2 Litt. Rep. 49. So the acceptance of property in satisfaction of a pre-existing debt, irrespective of its value, will have the effect to extinguish it. This is affirmed by several of the authorities cited. See also, Blinn v. Chester, 5 Day's Rep. 360.

The fact of the defendant's insolvency, can have no influence in determining, whether the agreement of the plaintiffs to accept a less sum than the entire debt, in full satisfaction, was without consideration; for whether he was insolvent or not, the obligation to pay was not impaired, and the moral duty remained in full force. If, instead of paying the money, the defendant had paid in property, or in a note or other security on a third person, or had delivered up to the plaintiff a note which he held on him for a smaller sum than the debt sought to be recovered, in either of these cases, we should be inclined to think the satisfaction complete. In the present case, it does not even appear that the note declared on was given up, but only that one of the plaintiffs agreed, when he received the money from the defendant, that the latter should not be required to pay any thing more. See Woolfolk v. McDowell, 9 Dana's Rep. 268. The authorities most conclusively show error in the ruling of the circuit court. Its judgment is consequently reversed, and the cause remanded.

THE GOVERNOR, &c., v. JACKSON, Adm'r, &c.

1. A recognizance taken by a sheriff from a defendant, whom he has arrested, under a *capias*, on a charge of felony, is void.

Error to the Circuit Court of Lawrence. Before the Hon. Thomas A. Walker.

THIS was a proceeding by *scire facias*, by plaintiff, against defendant in error, as administrator of one Gregory. An indictment was found against Lemuel Leonard, in the circuit court of Lawrence, for an assault, with intent to murder. A *capias* issued, under which Leonard was arrested, and entered into a recognizance, with Gregory, and another, as his sureties, before the sheriff of Lawrence county, for his appearance to answer the charge. Leonard failing to appear, as required by his recognizance, a judgment *nisi* was rendered against him, and his securities, upon which *sci. fa.* issued, and was executed on Gregory. The cause was continued for several terms, and at the spring term, 1848, the state's counsel suggested the death of Gregory since the last continuance, and asked for a *sci. fa.* against his personal representative, which was awarded. On its return, the administrator appeared by attorney, and moved to dismiss the *scire facias*, and the court granted the motion. This is the error now assigned.

ATTORNEY GENERAL, for the State.
ELMORE & YANCEY, contra.

CHILTON, J.—It is perfectly clear, that the sheriff had no power, by the laws of this state, to take the recognizance, proceedings upon which are attempted to be revived against the defendant in error. The principal was arrested upon a *capias*, for an offence punishable by imprisonment in the penitentiary. In such case, the law requires the sheriff "to convey the offender to the common jail, and there keep him in safe custody, until discharged by due course of law." Clay's Dig. 461, § 5. The recognizance being palpably void, there was no injury sustained by the refusal of the court to permit the revival of the proceedings against the administrator of the bail.

Let the judgment be affirmed.

UPCHURCH v. NORSWORTHY, Adm'r.

1. If one sells the goods of an estate before administration granted, and receives the money therefor, an after appointed administrator, may sue him in trover for the conversion, or waive the *tort*, and bring assumpsit for money had and received.
2. If one, without authority, sells the goods of an estate, and receives the money therefor, it is no defence to an action for its recovery, instituted against him by the administrator, that the sale was void, and vested no title in the purchaser.
3. Where an agent receives money for his principal, to which a third person is entitled, and pays it over to the former, before demand, or notice, from the latter, such payment discharges the agent from all liability.

Error to the Circuit Court of Pickens. Before the Hon. Samuel Chapman.

The defendant in error, as administrator of Thomas Woolfolk, declared against the plaintiff, in assumpsit. In the progress of the trial, a bill of exceptions was sealed by the presiding judge, which presents the following facts: The deceased, Thomas Woolfolk, died in 1840, possessed of a plantation, and sundry slaves. Before his death, he made and executed a will, in the following language: "I give my wife, every thing I possess, during her widowhood. If she marries, she is to have a third. Not to give security, when she qualifies, unless she marries, then to give security." This will, which was not executed in a manner to pass real estate, was probated in the orphans' court of Pickens, which was the county of the residence of the deceased at the time of his death; but no letters of administration, or testamentary, were granted to any one, until 1844, when letters of administration, with the will annexed, were granted to the defendant in error.

After the probate of the will, the widow proceeded to act as executrix, but never obtained any letters testamentary, and the plaintiff in error was employed by her, to act as her agent, in managing the affairs of the estate. The plaintiff, in the court below, proved, that the plaintiff in error sold

two slaves, belonging to the estate, at public auction, for $1,700. This sale was made in 1841, and notes for the purchase money were taken by him, payable to the widow, as executrix. It also appeared, that the widow shipped the crop of cotton, raised in 1840, in her own name, and in February, 1841, the plaintiff in error received the proceeds from the commission merchant, as her agent, amounting to about $725. There was evidence, tending to show, that the plaintiff delivered the money, on his return, to the widow, but there was other evidence, rebutting it. There was also testimony, tending to show, that the plaintiff had collected all the notes, given for the slaves sold, except about $105, which was still due on one of the notes, which note the plaintiff in error handed over to the defendant, together with about $290, after his appointment as administrator.

It appeared, that the plaintiff in error had paid about $1,600 of debts, against the estate, and which were owing, before the death of the testator. On this evidence, the court charged the jury, that if the defendant received the proceeds of the crop of cotton of the year 1840, he might be charged with it in this action.

The defendant requested the court to charge the jury, that if they believed, that the widow shipped the crop of cotton of 1840, in her own name, and that the defendant received the proceeds of the sale, from the commission merchant, as her agent, and, on his return from Mobile, delivered the same to the widow, then the defendant could not be charged with this sum. This charge the court refused, and instructed the jury, that if the defendant had been the mere bearer of the money, to the widow, and had delivered it to her, he could not be charged with it; yet if he received the money, knowing all the circumstances, from the commission merchant, he was liable for it, although he might have paid it to her.

The court also charged the jury, that the money the defendant received for the two slaves, he was liable for, unless he had paid it out in discharge of the debts of the testator. The defendant requested the court to charge the jury, that the sale of the slaves was void, and neither the notes given for them, nor the money received on them, were assets of the estate, and that the plaintiff could not recover of the defend-

ant, either the notes, or the amount received upon them. This charge the court also refused to give, and charged, that the plaintiff could bring his suit, either for the slaves, or their value, or for the money, and could recover it.

The charges given, and the refusal to charge as requested, are assigned as error.

E. W. Peck and N. Smith, for plaintiff in error.

1. The charge of the court as to the proceeds of the crop of cotton shipped by the widow of testator, is wrong in this: 1. The plaintiff in error was a mere bailee; he received the money for the widow, and was bound to deliver it to her. 2. The charge was calculated to mislead the jury, by saying, if he received the money, knowing the circumstances, he was liable,—I ask, what circumstances?

2. As to the charges respecting the sale of the two negroes, &c., and the notes taken for them, &c., I refer the court to the Digest, p. 223, § 13; Wier v. Davis and Humphries, 4 Ala. 443; Kelly's adm'r v. Kelly's distributees, 9 Ala. 908, 912; Fambro v. Gantt, 12 Ala. 298.

DARGAN, J.—At the time the plaintiff in error sold the slaves, neither letters of administration nor testamentary, had been granted of the goods of Thomas Woolfolk, deceased, and no authority whatever, to sell, had been obtained from the orphans' court. Such a sale, beyond doubt, is void, and gives the purchasers no title whatever. See 4 Ala. 442; 9 ib. 908; 12 ib. 298.

Yet, it does not follow, that the plaintiff in error can plead his want of authority to sell the slaves, in bar of this action to recover of him the money he has received upon such sale; or that he can insist, that his purchaser has no title, in order to defeat an action, brought against him for a conversion of the goods of the deceased; for the title of an administrator in chief, relates back to the death of the decedent, and he may, after obtaining letters, bring *trover* against those who have converted the goods of the estate, in the *interim*, between the death of the deceased, and thegrant of letters. 1 Williams Ex'rs. 396, 397; 8 East, 418; 12 Mass. 309; 23 Pick. 128. Our statute, regulating the sale of the personal estate of

deceased persons, does not take away from an administrator, any of the common law remedies, given him, for injuries done the estate; consequently although the title to the slaves be not vested in the purchasers, by their purchase from the plaintiff in error and as against the defendant in error the sale be absolutely void, yet the defendant cannot by insisting on his want of authority to sell, or that the sale conveyed no title, relieve himself from responsibility. If this were so—if the purchaser was unknown, or the property had been removed beyond the reach of the administratar, he might be without remedy.

Without regard, therefore, to the character of the title, acquired by the purchaser, or whether the sale *was void or not*, as the plaintiff in error assumed the authority to sell the slaves, it was a conversion of them, and he was liable, in an action of trover, for the value of the slaves thus converted; and the question arises, if he is liable for the conversion, may not the administrator waive the *tort*, and bring assumpsit, for the money actually received by the plaintiff in error, by means of the sale.

We think it is well settled, that if the goods of one have been taken from him tortiously, and the wrong doer has sold them, and received the money, the owner may waive the *tort*, and bring assumpsit for the money. Willett v. Willett, 3 Watts, 227; 10 ib. 431; 5 Hill, 577; 12 Pick. 120; 2 Gill. & John. 326; 3 Dana, 552.

These authorities all show, that after a sale, and receipt of the money, by the wrong doer, the owner has his election, either to bring trover for the conversion, or assumpsit for the money received.

But it is contended, that this rule will not apply, in this state, to an administrator, because he has not the authority, under our statute, to confirm the sale made by the wrong doer. We think it useless to enquire, what effect, the recovery against the *wrong doer*, either in trover or assumpsit, would have on the title of the purchaser; for, we have seen, that the plaintiff in error, cannot protect himself from his wrongful acts, even if his purchaser acquired no title, and we can see no reason, why an administrator may not as well waive a *tort*, and sue for the money received, as any other

owner of goods. We therefore, come to the conclusion, that the court did not err in the charge given, in reference to the money received by the plaintiff in error, on the sale of the two slaves.

But we think the court erred in the charge given, in reference to the proceeds of the crop, of 1840. It was shipped by the widow of the deceased, in her own name, was sold on her account, and the proceeds handed to the plaintiff in error, to be delivered to her; and there is testimony, tending to show, that he delivered the money to his principal, on his return home.

The rule of law, is, that where an agent receives money for his principal, to which the principal is not entitled, as against a third person, if the agent pays the money over to his principal, before any demand is made or notice given him, not to pay the money to the principal, such payment by the agent will discharge him from all liability. Thompson v. Stickney, 6 Ala. 579; 7 John. 179; 7 Cowen, 456.

At the time, the plaintiff in error received the $725, the proceeds of the crop of 1840, from the commission merchant, there was no person in *esse*, who had the right to receive it from him, except the widow of the deceased, and he was legally bound to pay it to her, for he had received it as her agent. If the plaintiff did pay it over to her, he discharged his legal obligation, and he is not responsible to any one else, unless the money had been demanded of him, or notice given him, not to pay it over, by some one, whilst he had possession of the money, whose title to it was superior to the title of the principal.

For this error, let the judgment be reversed and the cause remanded.

MORROW v. RILEY.

1. R. & M., partners in a house of entertainment, called on a person to make out an account current from the books, in the presence of the parties, and agreed verbally, that they should settle by the balance found by him; and if they could not agree upon the balance found by him, then they should call in two other persons to adjust the matter, and the party against whom the balance should be found, should pay it to the other. One of the partners refused to abide by the agreement, but the other proceeded, and had the account stated. Upon this account he sued the other: Held, there could be no recovery, although proof was made that the account was correctly stated from the books.

Error to the County Court of Monroe. Before the Hon. Rufus C. Torrey, Judge.

Action of assumpsit, by defendant, against the plaintiff in error, on the money counts. By bill of exceptions, it appears, that the parties were partners, under the name and style of Riley & Morrow, in the Monroe Springs, and kept a house of entertainment. A witness proved, that he was called on by them, to make out an account current, from the books in the possession of the parties, and that there was a verbal agreement, that they should settle by the balance found by the witness, and if they could not agree upon the balance found by the witness, that they should call in two other persons, to adjust the matter, and that the party against whom the balance should be found, should pay it to the other. This agreement the defendant below did not conform to, but refused to attend, and by direction of the plaintiff, the account was made out and struck by the witness, and being sworn to as correct according to the books, was offered in evidence. The defendant objected to this account going as evidence to the jury, but the court overruled the objection, and he excepted. The defendant asked the court to charge the jury, that unless Morrow assented to the balance struck by the witness, after it was struck, he was not bound by it; which charge the court refused to give, but charged, that if

there was a previous agreement to submit the matter to arbitration, though verbal, the jury might find for the plaintiff, without any assent after the balance was struck by the witness.

To the ruling of the court, to the refusal to charge as asked, and to the charge given, the defendant excepted, and now assigns them severally as error.

T. & J. Williams, for plaintiff in error.

One partner connot sue his co-partner at law, even after dissolution, unless there has been a settlement of the partnership accounts, and balance struck—(Phillips v. Lockhart, 1 Ala. Rep. 521; Wray v. Milestone, 5 Meeson & Welsbey, 21, with the references at the end of the case; McColl v. Oliver, 1 Stew. R. 510)—and the balance on such settlement must be complete. Collyer on Part. 152, marg. reference to Tremont v. Coupland, 9 Bing. 170; 9 Moore, 319. And there must be an express promise to pay the balance. So say some cases. 9 Bing. 170. On this, see the cases collected at page 153, (corner,) Collyer, 2d Amer. ed. by Barbour. There could not be a settlement without a dissolution, and the record does not show any dissolution.

A. B. Cooper, contra.

The record discloses facts which raise the presumption that the copartnership had been determined and ended. The parties agree that Moore should state the account, which should be final and conclusive. A balance being struck between partners, suit may be maintained without an express promise. See Collyer on Copartnership, 242, sec. 278-9; 243, sec. 280-1, note 1; 5 Meeson & Welsbey, 24; 11 Pick. 81; 18 ib. 315; 8 Metc. 454-5. Partnership transactions may be abstracted from the partnership accounts. Collyer, 238, sec. 274.

COLLIER, C. J.—It does not appear from the record, that the partnership between the parties in the Monroe Springs and house of entertainment was dissolved, even at the time of the trial in the county court; but conceding that it was previous to the institution of the suit, and the question is,

whether there had been such an adjustment of the accounts, as authorised the plaintiff to recover in the present action the balance alleged to be due him? In Phillips v. Lockhart, 1 Ala. Rep. 521, it was decided, that a party cannot maintain an action at law for money paid by him, on account of a partnership between himself and the defendant, although the partnership has been dissolved, and the money was paid after its dissolution: *Further*, "It is well settled that one partner cannot maintain an action at law against his former partner, even after a dissolution of the partnership, unless there be a settlement of accounts, a balance struck, and according to some authorities, an express promise to pay it." So in Grigsby v. Nance, 3 Ala. Rep. 347, we said, courts of law will not entertain suits for the recovery of money due form one party to another, by simple contract on the partnership account, because it would be useless for one partner to recover, what upon taking a general account amongst all parties, he might be liable to refund; *frustra peterit quod mox restiturus esset.*

In the case at bar, Moore was requested by the parties, to make out an account current from their partnership books, and in their presence; by this account the parties undertook to settle, but if they could not agree, they were to call on two persons designated, to adjust the matter, and the party against whom the balance should be found, should pay it to the other. The defendant when afterwards called on, refused to attend the accounts to be taken by Moore, but the latter at plaintiffs instance and in the absence of both parties, examined the books, made out an account current, and struck a balance. For the balance thus ascertained this action is brought.

Now it is perfectly clear that the defendant did not undertake to admit in advance the account which Moore might state from the books as a correct exposition of the dealings between the parties. Neither of them were to be bound by it. This is indicated by the stipulation to submit the matter to the arbitrament of other persons, if they could not agree upon the balance thus struck. It seems that they disagreed, and it does not appear that the referees ever acted in the business. There is then no pretence for assuming that

a balance was so adjusted as to entitle the plaintiff to recover.

It is needless to examine, with particularity, the ruling of the county court, as it is strikingly opposed to the view we have taken, and the transaction in question, instead of being disconnected from, and independent of the partnership dealing, is intimately blended with, and essentially a part of them. We have but to add, that the judgment is reversed, and the cause remanded.

WILLIAMS, JUDGE, &c., v. HINKLE ET ALS.

1. A motion to strike out a plea, is addressed to the discretion of the court, and its refusal, is not a subject of revision in this court.
2. Where a suit is instituted on an administration bond, against the administrator and his sureties, each may sever, and plead as many pleas as he may deem necessary to his defence.
3. In an action on an administration bond, against the administrator and his sureties, suggesting a *devastavit*, a judgment against the administrator *de bonis intestatis*, is not conclusive against the sureties, but it devolves on the plaintiff to show an actual *devastavit*, in order to fix their liability.
4. A judgment rendered against an administrator *de bonis intestatis*, in an action on a note payable to, and indorsed by him, in his representative character, is a clerical misprision, and in an action on the administration bond, against the administrator and his sureties, is insufficient to charge the sureties for an actual *devastavit* of the administrator.

Error to the Circuit Court of Lowndes. Before the Hon. Nathan Cook.

THIS was an action of debt, by plaintiff, against the defendants in error, on an administration bond, suggesting a *devastavit*. The facts, and errors assigned, sufficiently appear in the opinion delivered by the court.

J. M. Boling, for plaintiff in error.

1. The security of the administrator is bound for all the assets which come to the hands of the administrator, and should not be allowed to plead any thing which the administrator cannot, and therefore should not be allowed to sever in his pleas.

2. The pleas are all special, yet they amount to the general issue, if they amount to any thing, and are therefore bad. 1 Chit. Pl. 526-7-9, Am. fm. 6 Lon. ed. The proper course, is, to move to set aside such pleas. 1 Chit. Pl. 528, Ld. ed.

3. The second plea of Graves, alleging that the contract upon which the judgment in the circuit court of the United States was rendered, is not such a one with which the estate of George Clark could be charged, is bad, as being a subtle plea, in pleading matter arising before the judgment, and should have been stricken out. 1 Chit. Pl. 575.

4. The demurrers to each of the pleas of defendant Hinkle, certainly should have been sustained. Thompson v. Searcy and Fearne, 6 Port. 393; Dean et al. v. Portis, 11 Ala. 104. The demurrers, in like manner, should have been sustained to each of the pleas of Graves. See same authorities.

5. The inventory of an administrator, is sufficient evidence to charge himself and securities, and he must account how he has disposed of the assets. Ordinary v. Philpot, 1 Bay. 462; 3 Am. Dig. 274; Miller v. Gee, 4 Ala. R. 459; Dean et al. v. Portis, 11 Ala. R. 104.

6. A judgment cannot be impeached collaterally for error, while unreversed. White v. Albertson, 3 Dev. 241; Williams v. Woodhouse, ib. 257; Perryman v. The State, 8 Mass. 268; Obert v. Hammel, 3 Harr. 73; Barrister v. Higinson, 3 Shep. 73; 2 Sup. U. S. Dig. 230, § 291.

7. A judgment C. C. P. cannot be impeached as erroneous, in an action on such judgment, the proper remedy being by writ of error. Cook v. Darling, 18 Pick. 393; 8 Watts & Serg. 387; 2 Sup. U. S. Dig. 231, § 323; 233, § 341, 342.

8. A state court cannot inquire into the record of a circuit court of the United States. Pigot v. Davis, 3 Hawkes, 25; 2 Sup. U. S. Dig. 250, § 63. Can only inquire into any judgment upon the ground of fraud.

JUDGE, contra.

1. The motion to strike out the pleas was addressed to the discretion of the court below, and is not revisable on error. Johnson v. Wren, 3 Stew. 172; Turner et al. v. Brown, 9 Ala. 867.

2. It is perfectly clear, that defendants had a right to sever in their pleas; if not, however, the defect could not be reached by a separate demurrer to each plea. Vance v. Wells, 8 Ala. 399.

3. And the several pleas of defendants were well pleaded; but if they were not, plaintiff has not been injured, his evidence, (the whole of which is set out in the bill of exceptions,) showing he would not have been entitled to recover, no matter what the pleas, or whether well pleaded.

4. There was no error in the instructions of the court to the jury. The plaintiff was not entitled to recover as against Graves, because the judgment rendered against Hinkle in the United States court at Mobile, was on a cause of action created by him in his own name and right, and is in effect a judgment *de bonis propriis*. McEldery v. McKenzie, 2 Por. 33; Oliver, adm'r, v. Hearne and Whitman, 4 Ala. R. 271; Johnson v. Gaines, 8 Ala. 791; Skinner v. Frierson and Crow, ib. 915. And a return of "no property found," on an execution issuing on such a judgment, was not sufficient proof of a *devastavit* against Hinkle. Faulk v. Judge Co. Ct. Mo. Co. 2 Porter, 538; Quigley v. Campbell and Cleaveland, 5 Ala. 76. An *actual devastavit* must be shown, to charge the surety of an administrator on the administration bond. Thompson v. Searcy and Fearne, 6 Por. 393; Miller v. Gee, 4 Ala. 361; Dean et al. v. Portis, 11 Ala. 104.

CHILTON, J.—This was an action of debt, upon an administrator's bond, against the administrator, and one of his securities. The breach assigned, is, the non-payment, by the administrator, Hinkle, of $708, and cost, being the amount of a judgment recovered against him, as administrator of George Clark, by James H. Levwich & Co., for whose use this suit is brought, in the circuit court of the United States holden at Mobile, Alabama, which judgment was to be levied *de bonis intestatis*, in the hands of said Hinkle unad-

ministered. The plaintiff avers waste of the assets of the estate of the administrator, of greater value than would satisfy said judgment, and costs.

The defendants pleaded separately. The surety, Graves, pleading—1. Performance generally. 2. That he is but the security of Hinkle on the bond, and that no judgment against said Hinkle has been regularly rendered in favor of Levwich & Co., upon any contract with which the said estate of Clark could be charged in a court of law. 2. *Nil debet.* Hinkle pleaded—1. Performance generally. 2. *Plene administravit.* 3. *Plene administravit, præter*, the sum of ——, paid upon his resigning the administration, to one Lamkin, who was appointed his successor, as administrator *de bonis non* of Clark.

The plaintiff moved the court to strike out, or set aside, all the pleas, upon the ground that the defendants could not sever in their pleading, which motion, the court overruled. The plaintiff then renewed his motion, to strike out each plea separately, which was also overruled. The plaintiff then took issue on the fourth plea of defendant, Graves, and demurred to each of the others, which demurrers were overruled. Issues being formed on all the pleas, the plaintiff read to the jury the bond declared on, and the inventory of property of the estate of Clark, which came to the hands of Hinkle, the administrator, amounting, in value, to $157,875 98; also, a transcript of the record, showing the rendition of a judgment by the circuit court of the United States, at Mobile, for the sum of $708, in favor of James H. Levwich & Co., against said Hinkle, as administrator of Clark, to be levied of the goods and chattels of said George Clark, deceased, in his hands to be administered. This judgment, as appears by the record, which is set out in the bill of exceptions, was rendered upon a note, a copy of which is set out, as follows:

"Lowndes county, Jany. 11th, 1837.

"Sixty days after date, I promise to pay James Hinkle, administrator of George Clark, deceased, or order, six hundred and five 67-100 dollars, negotiable and payable at the Branch of the Bank of the State of Alabama, at Mobile.

Jno. M. Hamilton.

(Indorsed) *James Hinkle*, adm'r."

Upon this judgment, execution had issued against the goods and chattels of Clark, and had been duly returned "no property," &c.

The court charged the jury, that this evidence would not authorize the plaintiff to recover in this action, against either of the defendants. Further, that the judgment in the circuit court of the United States, was not such as would bind the estate of Clark, the intestate, or the securities of Hinkle, on his administration bond, but that it was a judgment against Hinkle, in his individual, not in his representative capacity, as administrator of Clark's estate.

The plaintiff having duly excepted to the several decisions and charges of the court, assigns thereupon, several errors, which may be reduced to three, namely: That the court erred—1. In refusing to strike out, or set aside, the pleas. 2. In overruling the demurrers to them; and 3. In the charges given to the jury. We will examine these in their order.

1. The refusal of the court to reject, or strike out, the pleas of the defendant, was a matter of discretion, and is not subject to revision in this court. Johnson v. Wren, 3 Stew. Rep. 172; Stanley et al. v. Hill, 9 Porter's Rep. 368; Turner v. Brown, 9 Ala. Rep. 867. So far as respects the right of the defendants to sever in their pleadings, were this not allowable in such case as the present, it may well be questioned, whether the plaintiff has pursued the proper course, to avail himself of the supposed defect. The rule adopted by this court in Vance v. Wells & Co. 8 Ala. Rep. 399, as to the mode of taking advantage of several replications to one plea, when the plaintiff was entitled to but one, would apply, it would seem, in principle, to cases like the present. This requires the party to move to strike out all but one, or to demur to the whole generally, so that the court may put the party to his election, as to the one on which he will rely. But there is no rule of law requiring the parties to plead jointly. The statute authorizes the defendant in any cause, to plead as many pleas as he may judge necessary to his defence, (Clay's Dig. 332, § 109,) and it might be necessary for the surety's protection, to plead matter personal to him-

self, in which the other defendant could not join, and which, in fact, would not, as to him, amount to a defence.

2. In respect to the several pleas, which were demurred to; the view we take of the case, as presented by the bill of exceptions, on the point arising out of the charge of the court, renders it unnecessary to enter into an examination of them, for if the plaintiff has shown that he cannot recover under any state of the pleadings for which he insists, it is clear that he has sustained no injury from the mispleading of which he complains. We would, however, observe, that we do not agree with the counsel for the plaintiff in error, that the defendants are confined to the plea of not guilty or *nul tiel record*, in an action upon the bond, suggesting a *devastavit*. In the case of Perkins v. Moore, judge, &c., at the present term, we decide, that the final judgment of the orphans' court, against the executor, upon the settlement of the estate, after a return of *nulla bona*, fixed a *devastavit* upon him, for which his sureties were liable. In that case, the extent of the *devastavit* had been ascertained by a court of competent jurisdiction. The case before us is different. In this proceeding the *devastavit* is to be ascertained, and the security is liable, not for the constructive, but to the extent of the *actual waste* of the assets committed by the administrator. By the common law, a judgment against an executor or administrator, upon demurrer, or by default, or upon any plea, except *plene administravit*, or admitting assets to a certain amount, and *riens ultra*, was conclusive upon him, that he had assets to satisfy such judgment. 1 Saund. 219, b.; 2 Williams' Ex'rs, 1201. So that, if the executor, &c. failed to plead *plene administravit*, or *plene administravit præter*, he cannot, afterwards, upon a *scire fieri* inquiry, or to an action of debt, suggesting a *devastavit*, insist upon such plea. Our statute, however, declares, that "no security for an executor or administrator, shall be chargeable beyond the assets of the testator or intestate, on account of any omission or mistake in pleading of the executor or administrator." Clay's Dig. 228, § 34. From this, it would seem necessarily to follow, that the surety is not concluded by the omission of the administrator to defend the action against him, by pleading, and proving, that he had fully administered.

3. We come then to the examination of the third and last point involved, namely, the sufficiency of the judgment rendered in the circuit court of the United States, to support the plaintiff's action.

In Oliver v. Hearne & Whitman, 4 Ala. Rep. 271, the declaration described the making of the note sued upon by the defendant as the administrator of one McGill dec'd, and averred that the said defendant thereby promised as adm'r to pay &c. Held the declaration was against the defendant individually and not in his representative capacity, and that a judgment *de bonis intestatis* thereupon rendered, must be considered a clerical misprision. Adm'rs of Weatherford v. Weatherford, 8 Por. 171; McElderry & Chapman v. McKenzie, 2 ib. 33—So, in a count for money lent to the defendant as *executor*, in consideration of which he promised, *as such executor*, to pay, &c., it was held, he, and not the estate he represented, was liable. Rose v. Bowler, 1 H. Black. 108. So also, in *indebitatus assumpsit*, for money had and received by defendant *as executor*, in consideration of which, he promised, *as executor*, to pay, &c., the judgment is *de bonis propriis*, and *plene administravit* cannot be pleaded. 2 Williams' Ex'rs, 1089; 4 T. R. 347.

These authorities clearly show, that the administrator's endorsement of a promissory note, made payable to himself, although he is described in the note as administrator, and affixes that designation to his signature, does not create a liability against the estate, and that the declaration which sets forth such cause of action, does not authorize a judgment against the unadministered assets of the estate in his hands.

The form of the present judgment, so far as it purports to bind the assets, being a clerical misprision, shall the security be affected thereby, and rendered liable for a debt which he would not otherwise be compelled to pay? Before the securities of the administrator can be made liable for a *devastavit*, there must be a judgment against the administrator on such proceedings as the execution may rightfully go against the goods, &c. of the intestate. For if the proceedings be against the administrator in his individual capacity, it is clear that he has had no opportunity of pleading that he has fully administered, or that no assets have come to his hands. Such

is the situation of the case at bar. The proceedings clearly show, that no judgment could regularly have been entered *de bonis intestatis*, and that such entry is a clerical misprision. The cause of action is one upon which the estate was not chargable; and for which, the security for the faithful application of the assets, should not be made liable.

We are aware of the rule, which forbids that a judgment should be collaterally impeached; that where the court rendering it has jurisdiction, the judgment, however irregular, must stand in full force, until set aside by a direct application. We do not trench upon this salutary rule. This action is not upon the judgment; it is but inducement—though its existence is a necessary averment in the declaration to sustain the plaintiff's action. As to its effect between the parties, we have nothing to do; all we decide, is, that the surety is not to be made liable for *devastavit*, because the clerk, in entering up the judgment, has made a mistake, or in other words, that a judgment, to be levied *de bonis intestatis*, rendered in an action against the administrator, in his individual capacity, and upon a cause of action for which the estate he represents was not liable, is not sufficient to charge the security upon his bond. This conclusion would seem to follow, from the previous decisions of this court. In Burke v. Atkins, et ux., 2 Por. 236, and Faulk v. judge, &c. of Monroe county court, ib. 538, it was held, that a suit could not be maintained on an administrator's bond against the surety, where it does not appear *that a judgment has been regularly rendered against the administrator, as such.* So, in Quigley v. Campbell and Cleaveland, 5 Ala. Rep. 76, where a judgment was obtained against an administratrix, under the statute of set-off, upon the certificate of the jury, that the plaintiff was indebted to the defendant, it was held that such judgment raised no presumption of assets, for the reason, the administratrix had no opportunity to rely upon the plea of *plene administravit.* We think the court below, very properly regarded the mistake which was amendable, as amended, and treated the judgment as *de bonis propriis.*

As, then, the record does not show that the plaintiffs are judgment creditors of the estate of Clark, and this, as we have seen, is necessary to be shown, to entitle them to a

judgment—(Thompson, use, &c. v. Searcy & Fearne, 6 Por. 396; 4 Ala. Rep. 361; 11 ib. 104; Perkins v. Moore, judge, &c., *supra*)—it follows, they could not sustain this action upon the bond, as it contains no provision against the non-payment of Hinkle's individual debts. The court, therefore, properly charged the jury as to the insufficiency of the judgment, and that the plaintiff, under the proof, was not entitled to recover. This being the case, although there may have been error in deciding upon the pleadings, there was not, and could not have been, any injury resulting therefrom to the plaintiff. Judgment affirmed.

SLATON v. APPERSON.

1. An attachment returnable before a justice of the peace, cannot be quashed in the circuit court, to which an appeal is taken, from the judgment of the magistrate, because the attachment was not executed in the county in which it issued; the objection not having been taken before the justice.

Error to the Circuit Court of Perry. Before the Hon. J. D. Phelan.

The plaintiff in error, sued out an attachment against the defendant, returnable before a justice of the peace. The attachment was levied on a buggy, in the county of Dallas, by a constable of Perry county, who took possession, and brought it into the county of Perry. The attachment being returned, showing that it had been levied on a buggy, as the property of the defendant, judgment by default was rendered against the defendant. From this judgment, an appeal was taken to the circuit court, and on the motion of the defendant, the attachment, and levy, were quashed, and judgment rendered against the plaintiff for costs. From this judgment, a writ of error was brought to this court, and the ruling of the court below, is now assigned as error.

GARROTT, for plaintiff.
MOORE, for defendant.

DARGAN, J.—The only ground for quashing the proceedings, and setting aside the judgment rendered by the justice, was, that the levy had been made in Dallas county. This objection is only *to the service* of the attachment. It is very clear, that the constable of Perry, had no authority to execute the writ in Dallas; but we do not think that the defendant can set aside this levy, by an appeal to the circuit court. The statute provides, that in all cases of appeals from a justice of the peace, the trial shall be had on the merits. Clay's Dig. 315. The defence set up by the defendant, was not to the merits, but extended to the service of the process merely. We do not think that he can be permitted, for the first time, to object to the service of the writ, in the circuit court. Such a defence is not to the merits, but is in abatement, and should not have been allowed. See Carter, Hagan and Plowman v. Douglass, 2 Ala. 499; Hill and Proctor v. White, 1 Ala. 576.

The judgment must be reversed, and the cause remanded.

HARDY ET ALS. V. BR. BANK AT MONTGOMERY.

1. When, in an action upon a note given for the purchase of a 16th section, the defendant pleaded "that the contract of purchase and sale had been rescinded by a vote of the electors in said township, according to law," and the plaintiff replied that "he could not gainsay the plea of defendant," a judgment was rendered, dismissing the suit, upon the assumption of costs by the defendant, this is not such a judgment as can be pleaded as a *retraxit*, in bar of another action upon the same demand.
2. A plea, stating, "that the said contract of purchase and sale was rescinded by a vote of the electors in said township according to the provisions of the law," is bad for uncertainty.
3. A plea, stating "that the commissioners of said 16th section never gave him, the said Geo. W. Hardy, a certificate of purchase, nor a deed to said

land," is bad, because not inconsistent with the validity of the contract of sale.

4. A plea "*puis darrein continuance*," which states, "that since the last continuance of the cause, to wit, on the 6th of March, 1848, the legislature enacted that when all the notes given for any 16th section, have fallen due, and suits have been instituted thereon, or any one of them, and suit defeated by any plea avoiding the contract of sale, the contract of sale shall be considered as rescinded, &c.," and which goes on to allege that that plaintiff had sued the defendant in the circuit court of Lowndes, and "said suit was defeated by plea avoiding contract of sale," is bad, as stating only a legal conclusion, and tending to produce prolixity.

5. The authority conferred, by the 13th section of the act of the 6th March, 1848, "to regulate permanently the 16th section fund" is the exercise of a power beyond the func tions of legislation, and is of consequence inoperative.

Error to the Circuit Court of Lowndes. Before the Hon. Nathan Cook.

This was an action by the defendant, against the plaintiffs in error, to recover the amount due on their promissory note, given for the purchase money of a sixteenth section. The defendants pleaded—

1. That the note sued on, was the third, of four notes, given by George W. Hardy, for a part of the sixteenth section, in township fourteen, and range twelve, in the district of lands subject to sale at Cahawba; that the two first had been previously sued on in that court, and at the spring term, 1845, the defendants in that action pleaded, "that the contract of purchase and sale, was rescinded by a vote of the electors in said township, according to the provisions of law," to which the plaintiff replied, "and said plaintiff says it cannot gainsay the plea of said defendants," whereupon, the defendants assuming the costs, judgment was rendered, "that said suit be dismissed, and that the plaintiff recover of the defendants, the costs in this behalf expended," &c.

2. That the note sued on, was given for a part of said sixteenth section, and "that the said contract of purchase and sale, was rescinded by a vote of the electors in said township, according to the provisions of law."

3. That the note sued on was given for a part of said sixteenth section, and "that the commissioners of said sixteenth section never gave him, the said George W. Hardy, a certifi-

cate of purchase, nor a deed to said land." The plaintiff demurred to each of the said pleas, and the demurrer being sustained as to the second and third pleas, but overruled as to the first, the plaintiff replied to the first, and the defendants demurred to the replication, which demurrer being overruled, they took issue thereon. The defendants pleaded three several pleas, *puis darrein continuance*, the 3d of which avers, "that since the last continuance of the cause, to wit, on the 6th of March, 1848, the legislature of the state of Alabama enacted, that when all the notes given for any sixteenth section have fallen due, and suits have been instituted thereon, or any one of the same, and suit defeated by any plea avoiding the contract of sale, the contract of sale shall be considered as rescinded, and held for nought: and defendants aver, that the note, the foundation of this action, was given for a part of the sixteenth section, in township fourteen, and range twelve, purchased by George W. Hardy: that all of the notes given therefor, have long since been due, before the institution of this suit, and that heretofore, to wit, in the circuit court of Lowndes county, the said plaintiff impleaded the said defendants, on two of the notes given for part of said sixteenth section, purchased as aforesaid, and that said suit was defeated by plea avoiding the contract of sale," &c.

To this plea plaintiff demurred, and the demurrer was sustained.

To the several rulings of the court, the defendants below excepted, and they now assign them as error.

Boling, for plaintiffs in error, cited Evans v. McMahan, 1 Ala. R. 45, to sustain the first plea. The agreement that defendants below (plaintiffs in error) were to pay the costs, shows that the whole suit was abandoned.

He cited the pamphlet acts of session '47-8, p. —, to sustain their pleas *puis darrein continuance.*

The replication of defendant in error to the first plea of plaintiffs in error, is bad. It does not make out such a state of facts as amount to fraud. It states nothing as having been done by G. W. Hardy, peculiarly within his own knowledge. If it shows any misrepresentation, it was the misre-

presentation of the legal effect of the conduct of G. M. Bender and Cowen, two of the commissioners of the sixteenth section. This does not amount to fraud. See Chit. on Con. 5 Am. from 3 Lond. ed. top p. 681.

T. J. JUDGE, contra.

1. The second plea of defendants below, was faulty, in averring that the contract was rescinded "by a vote of the electors, according to law," instead of the averment, that it was rescinded "by a majority of the voters of said township, voting in township meeting, upon due notice given," &c. Clay's Dig. 529, § 49.

2. The third plea was frivolous, and the demurrer to that rightfully sustained.

3. The plea marked No. 1, and which is not a plea *puis darrein continuance*, but which is the first of the three pleas pleaded by defendants below, on leave being given by the court to plead over, is defective in averring the rescision to have been made in a mode not provided for by law. For the only modes of annulling, or canceling a contract of that character, see Clay's Dig. 529, § 49; Pamphlet acts, session '47-8, 74, § 12.

4. The second of said pleas, which is a plea *puis darrein continuance*, is clearly defective; for the provision of the act referred to therein, was intended for the benefit of the inhabitants of townships in which sixteenth sections lie, and is to be operative in cases only, in which the commissioners of any sixteenth section may cause actions of forcible entry and detainer, forcible detainer, trespass to try titles, or ejectment, to be instituted, at their option. Pamphlet acts, session '47-8, page 74, sec. 13.

COLLIER, C. J.—1. In Evans v. McMahan, 1 Ala. R. 45, it was held, that a judgment as upon a *retraxit*, may be pleaded in bar to a subsequent action, for the same cause. In the case before us, the plaintiff replied to a plea filed in the previous suit as follows: "And said plaintiff says, it cannot gainsay the plea of said defendants." A judgment was rendered in that suit, affirming, that the plaintiff dismisssed its suit, and the defendant assumed the payment of costs. It is

perfectly certain, that the replication when taken alone, or in connection with the judgment, does not amount to what, in technical language, is designated a *restraxit.* True, the plaintiff admitted that he could not gainsay the plea, or, in other words, that its allegations could not be denied or disproved; but as a consequence of that admission, it did not confess, that it would not further prosecute the same, but from the same altogether withdrew itself; it merely dismissed its suit. This is nothing more than a mere judgment of dismissal, which according to all authority, cannot be pleaded in bar of another action, for the same cause.

The circuit court should have visited the demurrer to the replication to the first plea, on the plea itself. It is provided by the act of 1824, that "No cause shall be reversed, arrested, or otherwise set aside, after verdict or judgment, for any matter on the face of the pleadings not previously objected to: *Provided*, the declaration contains a substantial cause of action, and a material issue be tried thereon." Clay's Dig. 322 § 53. This enactment only inhibits the *reversal* of a judgment for a matter not objected to, previous to verdict or judgment, but does not forbid that a judgment shall be affirmed, by reference to a matter apparent upon the record, to which the attention of the primary court was not called, otherwise than by the rules of law operating upon the pleadings. To a case thus sitnated, the act does not apply, but the law remains unchanged in respect to it; and as it would have been proper for an appellate court, previous to its passage, to have looked to the plea, it is still an imperative duty to do so. Kent v. Long, 8 Ala. R. 44, is unlike the present case. There the defendant demurred to the plaintiff's replication to his plea, but pointed out no objection to the declaration. This court was of opinion that the circuit court properly overruled the demurrer, and refused to visit it upon the declaration, which it was supposed joined counts in case and assumpsit, because the objection was not pointed out before "verdict or judgment," and the declaration contained a substantial cause of action, on which a material issue was tried. The judgment was consequently affirmed under the influence of the act cited. This view relieves us from the necessity of considering the sufficiency of the replication.

2. It is provided by the act of 1843, that "Whenever a sale has been made of a sixteenth section, or part thereof, and such sale cannot, by reason of the insolvency of the purchaser or purchasers, of from any other cause, be made productive, a majority of the voters of the said township, voting in township meeting, upon due notice given, shall have power, with the assent of the purchaser or purchasers, to annul, or cancel the contract of sale for said section, or any lot or parcel thereof, which in not likely to be productive; and shall have power furthermore to resell, rent or lease the same, as if no sale had ever been made: *Provided*, that no money shall be paid back to the first purchaser or purchasers, whose contract shall be canceled by virtue of this act." Clay's Dig. 529 § 49.

The secnod plea is defective, because it does not specially set out the manner in which the sale was canceled, that it may be seen that the cancelation was according to the provisions of the act, which furniseed the only warrant, at the time the plea was interposed, by which it could be done. True it is stated, that the contract was rescinded *by the electors in the township*, but the *modus operandi* of their action does not appear, otherwise than by a general allegation, that the rescission was "according to the provisions of law, &c." These latter words merely affirm a legal conclusion of the pleader, without any basis either preceding or following them, on which it can rest for support. A plea must state facts, that the court may be able to say, from its inspection, that it is an answer to the action, and that the plaintiff may understandingly reply to it. It is too clear for argument, that the second plea does not conform to this requisition.

3. The third plea does not disclose facts inconsistent with the validity of the contract of sale. It may be true that the commissioners of the 16th section did not give the defendant a certificate, indicating that he was the purchaser of a part of it, or that it had not been conveyed to him by deed, yet it by no means follows, that he can avoid the purchase by setting up the statute of frauds. The plea does not negative the existence of any other written *memoranda* showing the sale, purchase, terms, &c: nor does it alledge that the defendant is not in possession, or that he has ever demanded the proper written

evidence of his purchase, or that there has been a refusal to furnish it. Taking it to be true, it does not set up an available bar, and the plaintiff could not have been required to reply to it.

4. The third plea *puis darrein continuance*, alleges substantially, that the note declared on, is the last of three of a similar character, given for the purchase of a part of a sixteenth section—all which have matured, and that actions instituted on the two former had been "defeated by a plea avoiding the contract of sale." This plea is founded on the thirteenth section of an act of the 6th of March, 1848, which enacts, "that when any sixteenth section, or part thereof, has been sold, and all the notes given therefor, have fallen due, and any one thereof remains unpaid, and the purchaser thereof has removed from the state, or died insolvent: or when any sixteenth section or part thereof, has been sold, and any one of the notes have fallen due, and suit has been instituted thereon, and such suit defeated by plea of the statute of limitations, or by any plea avoiding the contract of sale: or if such suit was matured into judgment, and a return of "no property found," made on any execution issued on such judgment, in any and all of the above cases, the commissioners of such sixteenth section, may cause actions of forcible entry and detainer, forcible detainer, trespass to try titles, or ejectment, at their option, to be instituted in the name of the governor of the state, against any person or persons in possession of such sixteenth sections, or part of said sixteenth section, in all the above ennumerated cases, the contract shall be considered as rescinded and held for nought." This is certainly a very singular enactment—one which it is difficult to support, upon any legitimate construction which its terms authorise. It professedly invests the commissioners of a sixteenth section, with authority to cause an action to be brought for the recovery of the possession of it, or any part which had been previously sold, upon the existence of one of five several facts, and makes the bringing of the suit, an election of the commissioners, to annul the contract of sale: or it is intended to annul the contract for either of the grounds, although no action is instituted. In neither view, can the statute be allowed to operate. The cases in which the commissioners are permitted to rescind, or in which the

contract may be treated as rescinded, may be thus classed 1. When all the notes given for the purchase money have fallen due, and any one remains unpaid, and the purchaser has removed from the state. 2. When the purchaser has died insolvent. 3. and 4. When a suit has been brought on any one of the notes, and defeated by a plea of the statute of limitations, or by plea avoiding the contract. 5. When a judgment has been recovered on either of the notes, and an execution issued thereon, returned "no property found."

In addition to the personal security which the purchaser of the whole, or part of a sixteenth section, is required to give, an equitable lien is retained by the vendor for the payment of the purchase money; not in virtue of any express contract, but it results from the retention of the legal title until full payment is made. The enactment then, if within the competency of the legislature, was wholly unnecessary, as a means of securing to the "inhabitants" of the township the proceeds of a sale. In addition to the equitable lien, there may be in the most, if not all the cases, for which it proposes to provide, other available remedies, by which a collection of the purchase money may be enforced. In the first case, though the purchaser has removed from the state, he may have left sureties, who are able to respond: in the second, the same state of things may exist, though the purchaser has died insolvent: in the third and fourth, although the statute of limitations may bar an action on the notes, still the equitable lien may be enforced. Doe ex dem. Duval's heirs v. McLoskey, 1 Ala. Rep. 708; Inge et al. v. Boardman, 2 Ala. R. 331. In providing that a plea in a previous action, on one of the notes, defeating a recovery upon a ground which maintained the invalidity of the contract of sale, that may, perhaps, be regarded as declaratory of what was previously the law. Rakes' adm'r. v. Pope, 7 Ala. Rep. 161. Conceding this to be so, and still the plea we are considering is defective, in not reciting the substance of the facts set forth in the plea, by which the defendant defeated a recovery in the previous suit. It merely sets out, by way of inducement, a recital of so much of the 13th section of the statute as was deemed pertinent, avers that the note declared on, was given for the sixteenth secton particularly designated—that all the

notes made upon that consideration, have been long since due; that previous to the institution of this action, the plaintiff impleaded the defendant on two of these notes, in the circuit court of Lowndes, "and that said suit, was defeated by a plea avoiding the contract of sale." Here is nothing more than the allegation of a *legal conclusion*—a mode of pleading, which the law with its increasing solicitude to avoid prolixity, will not tolerate. The pleader must disclose the facts upon which he founds his declaration, plea, &c., that the court upon their inspection and examination, may be enabled to pronounce the law. In this essential; we have seen the plea in question, is altogether deficient, and the demurrer, for this reason, if no other, was rightly sustained. 7 Bac. Ab. let. I, § 3. Bouv. Ed. In respect to the fifth class of cases provided for, the return of "no property found," would not *per se* impair the validity of the contract; but the equitable lien would still be operative—the property of the purchaser, should he acquire any, would be liable to satisfy the judgment, and the legal remedies against the sureties, would also continue in force. We have taken this view, for the purpose of showing how utterly valueless the enactment is, as a conservative measure, intended for the benefit of those interested in the educational funds, produced by the sale of sixteenth sections.

We now, propose to show, that the section in question, so far as it attempts to annul, or rescind the contract of sale, is an interference with the rights of others—the exercise of a power beyond the functions of legislation, and of consequence inoperative. In Long & Long v. Brown et al. 4 Ala. Rep. 622, it was held that the grant of sixteenth sections, by the act of congress, of the second of March 1819, is in perpetuity to the inhabitants of the several townships, but the legal title to the land is in the state, *in trust* for the inhabitants of the respective townships in which the same may be situated: *Further*, th at the act of thelegislature of 1828, authorizing the sale of the sixteenth section, in each township, with the *assent of the inhabitants thereof*, and providing for the profitable investment of the proceeds, was valid: and that a sale pursuant to the act, the payment of the purchase money, especially when evidenced by a patent to the pur-

chaser, was obligatory upon the inhabitants of the township, and passed the title. These questions were largely considered in the case cited, and it is now unnecessary, if not out of place, to repeat what was there said. We have, however, seen that the state is a *mere trustee*, holding the *legal title* to the sixteenth sections, for the benefit of the "inhabitants" of the several townships, and after a sale has been made, it retains it for the purpose of consummating the vendee's title, when the purchase money has been fully paid. The assent of the "inhabitants" of a sixteenth section, was essential to authorise a sale, and all legislation since 1828, up to the act of 6th of March 1848, made their assent a pre-requisite to annuling a sale. The legislature doubtless, regarded the interest of the *cestui que trust* as beyond its control, and the doctrine in respect to *trustees*, clearly establishes, that such was a correct view of the law. It is needless to enlarge upon this point, or to cite authorities to sustain it.

We may, however, add several well settled principles, which show the correctness of the conclusion we have stated, viz: the legal estate of the trustee shall not be carried further than the complete execution of the trust necessarily requires. Lewen on Trusts, 234, *et seq.* A *trustee* cannot, under a *simple* trust, exercise any dominion or control over the trust property, except it be in defence, or protection of the estate. Id. 412. *Again:* one who accepts a trust, takes it for the benefit of the *cestui que trust*, and not for any advantage to himself; as a further consequence of this rule, the beneficiary will not, in general, be subject to any disadvantage which may arise from the trustee personally, on account of his being seized of the legal estate; nor will he be prejudiced by the trustee doing what the trust does not authorize, or injured by his not doing that which it was his duty to perform. Willis' Trustees, 121. Further, the trustee must be careful to execute the trust faithfully according to its terms and the intention of the party by whom it was created; he is bound not to do any thing to defeat the trust reposed in him—has sometimes been injoined from doing so, and compelled to give security for its performance. Id. 124; Morris v. Clarkson, 1 Jac. & Walk. Rep. 107.

From this view, it results, that the thirteenth section of the

act of 1848, so far as it assumes to annul a contract for the sale of a sixteenth section, or a part of it, is the assertion of a power, which cannot be exercised without the assent of the inhabitants of thetownship, or a majority of them. The question, whether a contract is rescinded, or may be rescinded without the consent of both parties, involves a judicial inquiry, which it is incompetent for the legislature to determine; and if it was intended to have that effect, we have no hesitation in declaring that *pro tanto*, it is merely inoperative. There is, therefore, no error in the ruling of the circuit court, and its judgment is consequently affirmed.

TWELVES & Co. v. LODANO.

1. When a garnishee in attachment, answers, denying indebtedness to the defendant in attachment, an issue may be made up, with the consent of the plaintiff, to try the fact of such indebtedness, between the defendant in attachment, and the garnishee, upon the affidavit of the former, controverting the answer of the latter.
2. An attachment was sued out by T., against F., and L. was garnisheed as a debtor of F. After service of the garnishment, F. obtains judgment against L. for the amount of the debt due from him, in the same court in which the attachment is pending, and execution issuing thereon, L. paid the amount to the sheriff, by whom it was paid to the attorney of F., who, pursuant to instructions previously given him by F., paid the money to a third person: held, that upon this state of facts, the garnishee was liable to the plaintiff in attachment.

Error to the County Court of Mobile. Before the Hon. John A. Cuthbert, Judge.

The facts fully appear in the opinion of the court.

Lockwood, for the plaintiff in error.
Campbell, contra.

CHILTON, J.—The plaintiff in error, having sued out an attachment against one William J. Faries, the sheriff served a summons of garnishment upon the defendant in error, to appear before the county court to which the attachment was made returnable, to answer what he was indebted, &c., to Faries. At the trial term of the attachment, Faries appeared and confessed judgment upon the attachment, in favor of the plaintiffs, for the sum of $255 89. At the same term, a judgment *nisi* was rendered against the plaintiff in error, he having failed to appear, in obedience to the summons. A *scire facias* having issued, and being served on the defendant, he appeared at the June term, 1846, and answered the garnishment, denying any indebtedness to Faries. Thereupon Faries, the defendant in the attachment, was permitted to contest the garnishee's answer, and he filed an affidavit, averring that said answer was incorrect, and that said garnishee owed him, at the time of the service of said garnishment, the sum of $300, for rent of certain property in the city of Mobile, in the year 1844.

An issue having been made up between the parties, the jury found a special verdict, setting forth the following facts, viz: "That on the 17th day of May, 1845, when the summons of garnishment was served, said Lodano was indebted to said William J. Faries, in the sum of $300, in the manner set forth in the affidavit of said Faries. That on the 1st day of April, 1847, said Faries obtained a judgment against said Lodano, in the county court of Mobile county, for the sum of $346, for the same indebtedness described in said Faries's affidavit, and on the 15th day of April, 1847, an execution issued upon said judgment. That on the 27th day of April, 1847, Lodano paid the sheriff of Mobile county, the sum of $347 70, the debt, and $126 94, costs, in full satisfaction of said execution. That said sheriff, on the same day he received the money, paid the principal and interest to John Rolston, Esq., the attorney of record of said Faries, who obtained the judgment. That said Rolston paid said money, less his fees, to one J. S. Marsh, according to the verbal instructions given him by said Faries, some time after the garnishment had issued, and previous to the makaing of the affidavit by said Faries in this case. That said Rolston had

received no other, or subsequent instructions from said Faries, in relation to the collection, or appropriation of said money, than the order above stated."

The plaintiff then produced his said judgment, rendered on the attachment against Faries, and moved the court for judgment against the garnishee, on the special verdict above set out. The court, however, refused to render judgment for the plaintiff, and discharged the garnishee. A bill of exceptions was also sealed at the trial, but it presents only the points of law raised by the special verdict of the jury: in that, it is shown that the defendant insisted upon being discharged also, upon the ground, that the affidavit for contesting his answer, had not been made by the plaintiffs in the attachment.

In Hitt v. Lacy, 3 Ala. Rep. 104, it was decided, that a debt in suit may, under the attachment laws of this state, be attached at the suit of the creditor of the plaintiff, where the suit is pending in the same court. This position is not gainsayed, but it is contended, that as the contest was predicated upon the affidavit of the defendant in the attachment, who was permitted to contest the answer, the whole proceeding was *coram non judice*, and no judgment could properly have been rendered on the verdict. The statute provides, "that the defendant may in all cases, show, by competent testimony, that a garnishee is indebted to him in a greater amount than he is willing to admit on oath." This statute, though it prescribes no mode in which the defendant may controvert the answer of the garnishee, must, nevertheless, be carried out by the court, and the court is necessarily compelled so to mould the form of the proceeding under it, as to render it effectual, else it will remain as a dead letter upon the statute book.

In the case of Graves v. Cooper, 8 Ala. Rep. 811-815, the correct practice, we think, was pointed out, which is, for the defendant to deny the correctness of the answer on oath, and to file a suggestion of the nature of the garnishee's indebtedness, as in a declaration, to which the garnishee may plead, and the judgment, if against the garnishee, is one of condemnation to pay the plaintiff's demand. That this practice may involve embarrassing questions, is certainly true; but these

questions do not arise in the case before us, and we defer a decision upon them, until a case shall arise presenting them. There is nothing in the record to show, that the issue was made up against the consent of the plaintiff in the attachment. On the contrary, we might well infer his consent from the fact, that after the contest resulted favorably, he moved for judgment upon the verdict.

The order to contest, was made in this case, at the time the garnishee answered, so that no question can arise upon the permission given by the court, to amend the affidavit at a subsequent term. 8 Ala. 811.

The record, in our opinion, furnishes no reason why the court should not have rendered judgment upon the special verdict, in favor of the plaintiff in attachment. The judgment must therefore be reversed, and here rendered upon the verdict, as the court below should have rendered it.

MERRIWEATHER, Adm'r, v. TAYLOR.

1. A recovery may be had for work and labor, when the defendant has accepted the work, although it does not amount to a complete performance of the special contract.
2. When the suit is on the contract, the plaintiff must prove the work done, according to the agreement, and cannot recover by proving the use, and acceptance of the work, by the defendant. But when the suit is on a note, executed after the work was done, proof by the defendant that the work was not completed according to the contract, will merely reduce the recovery *pro tanto*, but the plaintiff will be entitled to recover, as much as the work was reasonably worth.

Error to the Circuit Court of Montgomery. Before the Hon. George Goldthwaite.

This was an action of assumpsit, on a promissory note, executed by the defendant, to the plaintiff's intestate, for four hundred dollars, bearing date the 5th of May, 1846, and due

the first day of January, 1847. The plaintiff read the note as evidence, and closed. The defendant then introduced a witness, who testified, that he was present when the defendant employed the plaintiff's intestate, in the fall of 1845, to dig a well. The intestate agreed to dig a well on the plantation of the defendant, that would afford a sufficient supply of water for the use of the plantation, and the defendant agreed to pay him four hundred dollars, when the well was complete.

The plaintiff's intestate bored a well 450 feet deep, and the water rose within 67 feet of the surface. A cistern was dug by the side of the bore, or well, 59 feet deep, and the water was let into the cistern. The intestate then left off working. This was in March, 1846. The well was used by the defendant, but the witness stated, that it never did afford a sufficient supply of water for all the purposes of the plantation. Some time in the summer, after the date of the note, the defendant finding that the well failed to supply a sufficient quantity of water, sent for Cain the intestate, who went down into the well, and did some work, but still the well did not afford water sufficient. This witness also testified, that in his opinion, if the well had been dug twenty feet deeper, it would have afforded an ample supply of water, and that it would cost from two to three dollars per foot to deepen it. Another witness stated, that in the fall of 1846, he went to live with the defendant, and found no bucket to the well; he fixed one, and discovered, there was about ten feet of water in it, and that the well did not supply a sufficiency of water for the farm; but they used it as long as there was water in it, and thinks it is never dry.

The plaintiff requested the court to charge the jury, 1st. If they believed the defendant gave the note in May, after Cain had quit working on the well, that it was conclusive evidence that the work was completed according to the contract. 2. That if the jury believed the note was executed after the intestate had quit working on the well, and the defendant had used the well, and if they also believed from the testimony, that by digging 20 feet the well would have supplied a sufficient quantity of water, then the plaintiff was entitled to recover all of the note, deducting therefrom the sum

it would require to deepen said well 20 feet. 3d. That if the defendant could have ascertained, at the time of giving the note, by using diligence, that the well did not answer the terms of the contract, but without using such diligence, he gave his note, the plaintiff was entitled to recover. 4. That if the note was given upon the consideration of a contract, that the intestate should dig a well that would supply the defendant's plantation with a sufficiency of water, without any other specification of the quantity of water, or how long the well should continue to supply a sufficient quantity of water, that the contract was too uncertain to bind the plaintiff's intestate, and if the defendant gave his note after the plaintiff's intestate ceased to work, that the note was conclusive, and the plaintiff entitled to recover; all these charges, the court refused to give. 5. The plaintiff then requested the court to charge the jury, that if the defendant gave his note after he knew the well did not furnish water, according to the contract, that this was conclusive upon him. This charge the court gave, but also charged further, that if the note was given upon the consideration of a contract, that the intestate should dig a well, that would supply the plantation of the defendant with a sufficient quantity of water, and the note was given under the belief that the well was completed according to the contract, and that it would supply his plantation with sufficient water, and in fact the said well was not completed according to the terms of the contract, and did not afford a sufficient supply of water for the defendant's stock, and plantation purposes, that the plaintiff could not recover. The court also charged further, that if the defendant had accepted the well, not as complete according to the contract, but as being of some service or value, to him, and had executed the note, in consideration of such value, that then the plaintiff could recover.

To the refusal to give the several charges as asked, and to the charges given, the plaintiff excepted, and now assigns them severally as error.

Williams, for plaintiff in error.

1. Before the execution of the note, Taylor should have examined the work, and ascertained whether, or not, it was

executed according to the terms of the contract; or show that he was prevented from doing so by fraud or accident, or the act of the opposite party, unmixed with fault or negligence upon his part. Chit. on Con. 627; Kennon v. McRea, 7 Por. 135.

2. When goods are sold for a note, to be given at six months, if the goods are delivered, and the note not demanded until nearly two months after the sale, the condition will be deemed to have been waived. Payne v. Shadbolt, 1 Campbell, 427; Haswell v. Hunt, 5 Durnford & E. 231; Hanegan v. Sands, 25 Wend. 640.

3. When a party engages to perform certain work, according to specifications, and does not perform it, as specified, what he is entitled to, is the price agreed upon, less the sum which it takes to make the work agree with the specifications. Jewett v. Western, 2 Fairf. Rep. 249; Thornton v. Place, 1 Moody & Robinson, 218; Legget v. Smith, 3 Watts's Penn. R. 331, 333; Hollingshead v. Mactier, 13 Wend. 276; Peden v. Moore, 1 S. & P. 79, 80, 81.

4. If, by the terms of the contract, the plaintiff was bound to have bored such a well, as would furnish a constant supply of water, which the well would not do, then the action was prematurely brought, and defendant should have pleaded in abatement. Lockhart v. Avery et al. 8 Ala. R. 502.

Semple, contra.

1. The judgment sets forth, that issue was joined between the parties, and it must be intended, that the proper pleas were filed by defendant. Lucas v. Hitchcock, 2 Ala. R. 287.

2. The note is merely evidence of the contract of the defendant in error; and the plaintiff in error is in the some position in an action on the note, as he would occupy, if the action had been specially on the contract, and a note had not been made.

3. In an action on a contract specially declared on, the plaintiff can recover nothing, unless he shows a complete performance on his part, and it is only in cases, in the course of which, where there is a declaration on the contract, and the plaintiff fails in proving the contract, that he can recover for the value which the services may be of, to the defendant, and

then only on the common counts. 2 Greenl. Ev. § 104, and cases there cited. All the cases cited by plaintiff in error, to show that when the contract is departed from, the plaintiff may recover the value of the work, are qualified by the fact, that the contract is departed from with the consent of the defendant, express or implied.

DARGAN, J.—We think it very clear, that the defendant was not precluded from showing, by way of defence, that the well was not completed according to the terms of the contract, agreed on between the plaintiff, and himself, although he gave the note after the work was done, if at the time he executed the note, he believed the work was completed according to the agreement. But as the well was accepted, and used by the defendant, the plaintiff was entitled to recover as much as the work was reasonably worth, although the work was not performed, strictly in accordance with the provisions of the contract. The rule is, that a recovery may be had for work and labor, when the defendant has accepted the work, although it does not amount to a complete performance of the special contract. Thomas & Trott v. Ellis & Co. 4 Ala. 108; 2 Greenl. Ev. § 104.

This is not denied by the defendant's counsel, but it is insisted, that a recovery in such a case, can only be had on the common counts, for work and labor done; and as the plaintiff has not declared for work, and labor, he cannot recover. It is true, that if the plaintiff had declared on the contract, before he could entitle himself to a recovery, it would have been incumbent on him to show, that he had performed the work according to the agreement; and if he failed to do this, he could not recover, although he might have shown, that the defendant had accepted, and used the work.

But the plaintiff does not sue on the special agreement: he sues on the note given for the work, after it was done. The performance of the agreement, is, then, the consideration of the note which is declared on, and the evidence tending to show, that the work was not done according to the contract, impeaches the consideration of the note, and to avoid a recovery *in toto*, he must show, that the consideration has entirely failed. If he only shows a partial failure of

consideration, he can only reduce the amount of the recovery *pro tanto*, and the plaintiff is entitled to recover the amount, that the consideration received by the defendant was actually worth. The plaintiff, therefore, was entitled to recover, although he has declared on the note alone, as much as the work was reasonably worth. The charge of the presiding judge, however, denied the right of the plaintiff to recover, notwithstanding the work had been accepted by the defendant, unless he showed that the work was completed according to the agreement. In this the court erred, and the judgment must be reversed, and the cause remanded.

THE STATE EX REL. THE HEIRS OF WALKER v. THE JUDGE OF THE ORPHANS' CO. OF MACON.

1. Where the judge of an orphans' court is advised, that an injunction has been granted at the instance of the executor of an estate, to restrain the heirs and distributees from proceeding with a settlement begun in said court, it is a sufficient reason why he should suspend all further proceedings, as long as the injunction continues in force.
2. An appellate court will not, in an indirect proceeding, undertake to decide upon the equity of a bill in chancery, or the propriety of an order made thereupon.
3. A *mandamus* will not be granted to command an inferior tribunal to do that, which it could not legally do without such mandate.
4. Where the judge of an orphans' court refuses to proceed in the settlement of an estate, should not an application for a *mandamus* be first made to the circuit court? *Quere.*

Petition for a *mandamus.*

THE facts on which the petition is based, sufficiently appear in the opinion.

WM. L. YANCEY, for plaintiffs in error.

1. The court of chancery, not being a supervisory court, cannot prohibit the orphans' court from proceeding to exercise its jurisdiction.

2. An injunction cannot issue, to enjoin another court. 2 Story's Eq. Jurisp. § 875; Eden on Injunctions, ch. 2, p. 14.

3. An injunction can only enjoin parties litigant, or persons making illegal interference with rights of complainant. See cases cited above; 1 Barbour's Ch. Pr. 619; Fellows v. Fellows, 4 Johns. Ch. Rep. 25.

4. An injunction, so far from being an inhibition to a court, is designed to prevent an unjust exercise of the process of the court at law, by the parties. See authorities cited.

5. This court will not look into the equity of the bill filed, or its want of equity. The orphans' court, having jurisdiction of the settlement of estates, will be deemed competent to try and determine this cause.

Belser & Harris, contra.

COLLIER, C. J.—A *mandamus* is asked, in this case, to compel the orphans' court of Macon to proceed in the settlement of the testator, Walker's estate. From the record submitted to us, it appears that an injunction has been granted at the instance of the executor, enjoining the heirs from proceeding in the orphans' court, "for the settlement of the estate of William Walker, deceased, and the court from molesting or disturbing" the executor, until the further order in chancery. The condition upon which the *fiat* for the injunction was granted, has been complied with, and the injunction has been served on the judge.

It is insisted, that as such process cannot be rightfully granted against a court, or the judge thereof, the injunction is thus far a mere nullity, and affords no warrant for the refusal of the judge to perform the duties required of him by law. Without stopping to inquire whether the judge of the orphans' court is a proper party to the executor's bill, it will be observed, that the heirs who are attempting to coerce the settlement are also parties, and whether they have been served with process or not, the information which the judge has received, furnishes a reason quite sufficient why he should suspend proceedings, as long as the injunction continues in force. It does not appear affirmatively, that the process has not been served on the heirs and distributees of the testator, but even

if this has not been done, if they have been informed that they have been enjoined from proceeding further, by the injunction, which has been regularly made known to the judge, is it certain that they would not be guilty of a contempt, if they should proceed in despite of its mandate? However this may be, no court should, in an indirect proceeding, undertake to scan the equity of the bill, or the propriety of the order, made upon it. These are questions which must be adjudicated in chancery, and if either party should be dissatisfied with the decision there, the revisory powers of this court are competent to afford adequate relief.

A writ of *mandamus* is certainly the appropriate remedy to compel inferior tribunals to perform the duties required of them by law. Commonwealth v. Hampden, 2 Pick. Rep. 414; Carpenter v. Bristol, 21 Pick. Rep. 258. So, a *mandamus* will lie where there is a clear legal right, and no other appropriate legal remedy. Ex parte Jones, 1 Ala. Rep. 15; The State v. The Justices of Moore, 2 Ired. Rep. 430; Goings v. Mills, 1 Ark. 11; The People v. The Corporation of Brooklyn, 1 Wend. Rep. 318. But this writ will not lie where the party is entitled to another specific remedy; nor will it be granted, where the party complaining may have a writ of error. Ex parte Nelson, 1 Cow. Rep. 417; Bank of Columbia v. Sweeny, 1 Pet. Rep. 567; Commissioners v. Lynah, 2 McC. Rep. 170; State v. Holliday, 3 Hals. Rep. 205; State v. Dunn, Minor's Rep. 46; Justices v. Munday, 2 Leigh's Rep. 165. An erroneous decision of a subordinate court, cannot be revised by a *mandamus* from an appellate tribunal. Ex parte Hoyt, 13 Pet. Rep. 279; Warren Co. v. Daniel, 2 Bibb's Rep. 573; Oneida Common Pleas v. The People, 18 Wend. Rep. 79; Ex parte Gordon, 2 Hill's Rep. (N. Y.) 363; Ex parte Koon, 1 Denio's Rep. 644; The State v. Bowen, 6 Ala. Rep. 511. Nor will a *mandamus* be awarded, to command an officer to do that, which it was not lawful for him to do, without such a mandate. Gillespie v. Wood, 4 Hump. Rep. 437; Ross v. Lane, 3 Smedes & M. Rep. 695.

This brief condensation of principles very conclusively shows, that the prayer of the petitioner should not be granted. We have seen that the injunction was sufficient to arrest the

action of the judge of the orphans' court, and that in despite of its mandate he could not legally proceed. This being the case, a *mandamus* would oblige him to do that which he could not legally do without it, and to effect such a purpose it cannot be awarded.

Again: the petition objects to the order of the chancellor, and draws in question his decision upon a matter on which he has ample authority to act. This, we have said, cannot be done collaterally. The law has provided a clear remedy for the petitioners, by moving to dissolve the injunction, or dismiss the bill, and if the decision of the chancellor shall be adverse to them, they may prosecute an appeal or writ of error to this court.

Conceding, however, that a proper case was made for a *mandamus*, then it may be asked, if the writ should not have been first moved for in the circuit court. See ex parte Jones, 1 Ala. Rep. 15; The State ex rel. The Attorney General v. Williams, 1 Ala. Rep. 342, and several later decisions of this court.

We have but to add, that the prayer of the petition is denied.

TODD v. TODD.

1. The representative of the husband, and not the wife, is entitled to sue for work and labor performed by the wife, during the coverture.
2. Where the accounts between parties are not mutual, but are all on one side, the entire account is not taken out of the bar of the statute of limitations, because one, or more items of the account, are not within the statute.
3. Where a plea pleaded by its name, is received in short, by the other party, no objection can be taken to it, in this court, for not being in proper form.

Error to the County Court of Chambers. Before the Hon. Clement C. Forbes, Judge.

The facts are set out in the opinión of the court.

ALLISON, for plaintiff in error.

1. By the marriage, the husband and the wife are one person, in law; he is entitled to her work and labor, and all her earnings, and should he die his representatives are entitled to them. 1 Bl. Com. t. p. 355; 1 Chitty's Pl. t. p. 29; Chitty on Con, 38; Morris v. Booth and Wife, 8 Ala. Rep. 907.

2. The account of the defendant in error, was composed of distinct items of different kinds, and a liability to pay for some of the items, cannot withdraw others from the influence of the statute of limitations. 5 Ala. Rep. 504.

BAUGH, contra.

The plea of the statute of limitations must contain an answer to all it assumes to answer; and if it fail to do so, it is not an effective bar even as to the part really answered. 1 Chit. Pl. 546.

In assumpsit on several promises in different counts, if the defendant plead the statute of limitations to the whole, and it is a bad plea as to one of the counts, it will also be insufficient as to the residue. 1 Chit. Pl. 546; 2 Mass. R. 81.

CHILTON, J.—The defendant in error, who was the plaintiff in the court below, sued the plaintiff in error, on an open account, for work and labor done and performed, &c., by the request, &c., of said plaintiff. It is shown, by the proof, that some of the items in the account, were for the labor of the plaintiff below, while she was a *feme covert;* her husband having died before the commencement of this suit. Also, that some of the items were barred by the statute of limitations of three years, which was interposed, unless the whole amount was taken, without the influence of the statute, because some of the items occurred within three years.

1. By the common law, the husband and wife, are considered as but one person, and the husband being the "head of the wife," as it is quaintly observed by the old writers, "therefore all that she hath belongs to him." "The husband," says Mr. Clancy, page 3, "is entitled to all sums of money which the wife earns by her skill, or labor, and these

he has absolutely and in his own right, and not in her's; and if he die without having recovered them, they do not survive to her but his executor's shall have them." So it was held in Morgan v. The Thames Bank, 14 Conn. Rep. 99, that personal property accruing to the wife, during coverture, vests immediately and absolutely in the husband. See McGehee v. Ford, 5 Smedes & Mar. 769; Jones v. Warren, 4 Dana, 333: Savage v. King, 5 Shep. 301; Clapp v. Stoughton, 10 Pick. 463; Machen v. Machen, at the present term. These authorities may suffice to show, that the court erred in refusing to charge the jury, that the plaintiff could not recover, for work done by her during the coverture.

2. In respect to the statute of limitations, ever since the decision of Catlin v. Skoulding, 6 T. R. 189, it has been considered the settled rule, both in England and in nearly all the American courts, that mutual accounts, of however long standing, between persons who do not come within the description of "merchants," are not barred, if any items in the account, come within the time prescribed by the statute, as a bar. Angel on Lim. 132 (2 ed.) note 3, where the numerous authorities are collated. But this rule is confined to cases of *mutual* accounts, where there has been a reciprocity of dealing between the parties, and does not apply to an account where the items are, as in this case, all on one side. Cotes v. Harris, Bul. N. P. 149; Turnbull v. Strocker, 4 McCord's R. 214; Angel on Lim. 135. It results, that the court also, mistook the law in charging the jury, "that if there was proof, showing that one item in the account was rendered within three years, that took the whole of the items without the influence of the statute of limitations.

3. The third and fourth charges, seem to involve legal truisms, and we are inclined to think, they appear as refused from some clerical misprision. The one asserts, that the plaintiff should not recover, for such items in the account as are for work done by a third party, not the servant, or in the employment of the plaintiff. The other insists that if the plaintiff did the work, on materials furnished by the defendant, she could only recover for the work, and not for the materials.

4. The question attempted to be raised, in this court, upon the sufficiency of the plea of the statute of limitations, we

do not think, arises properly upon the record before us. The plea was received in short, by the consent of the plaintiff below, and we must intend, that had the pleader been required to have drawn it out at length, he would have put it in proper form. Being pleaded merely by name, we must regard its form as adapted to the defence, as indicated by the proof, and as embracing the items to which it applies.

Let the judgment be reversed and the cause remanded.

JORDAN v. THE STATE.

1. The 2d section of the act of 1846, requiring slave dealers to take out a license, is repealed by the 87th section of the act of 1848, to provide for the assessment, and collection of taxes; and as the last act contained no provision for the punishment of offenders under the former law, no fine can be imposed on those violating its provisions, after its repeal.

Error to the Circuit Court of Lauderdale. Before the Hon. Thomas A. Walker.

The plaintiff in error was indicted at the fall term, 1847, of the circuit court of Lauderdale, fer selling slaves without a license, under the act of 1846. On the trial, the defendant requested the court to charge the jury, that the 2d section of the act of 1846, under which he was indicted, was repealed by the act of 1848, and that the defendant could not be convicted. This charge the court refused, but charged, that if the defendant sold the slave without a license, he was guilty, notwithstanding the act of 1848.

The defendant tendered a bill of exceptions, which was sealed by the judge, and the cause is removed here by writ of error.

Wm. Cooper, for plaintiff.

THE ATTORNEY GENERAL, for the State.

The defendant was indicted under the 2d section of the act of 1846, for selling slaves without license, and before trial, the revenue act of 1848 was passed, merely re-enacting the same law of that of 1846, except laying the tax at $10 on each slave sold, instead of $5. In every other respect the acts are the same, and the penalty the same.

The question is, does the act of 1848, § 87, (pamphlet, p. 28,) repeal the 2d section of the act of 1846, pamphlet, p. 3.

1. The law never favors the repeal of a statute by implication, except they be irreconcilable or repugnant. Wyman et al. v. Campbell et al., 6 Por. 219; Kinney v. Mallory, 3 Ala. 626.

2. Imposing a new penalty for an offence, repeals, by implication, so much of a former statute, as establishes a different penalty; but the penalty is the same in both statutes. Nichols v. Squire, 5 Pick. R. 168; Commonwealth v. Kimball, 21 ib. 375.

3. No revenue act was repealed, or any section thereof, by the revenue act of 1848, except those which came in conflict with its provisions. Those which came in aid, are declared to be in force, and there is no conflict of the acts. See revenue act of 1848, sec. 105, p. 35.

DARGAN, J.—The defendant was indicted under the second section of the act of 1846, which provides, that every slave merchant, trader, dealer or broker, in slaves, before he shall be authorized ts sell any slave in any county of this state, shall procure from the clerk of the county court of said county, a license, for which he shall pay five dollars, on each slave he shall offer to sell, which license shall authorize him to sell such slaves, in any county in this state: and if any such merchant, trader, &c., shall sell any slave, without first obtaining such licence, he shall forfeit and pay three hundred dollars, on indictment, and conviction therefor, in the county in which said slave was sold. On the trial, a bill of exceptions was taken, which shows, that the defendant requested the court to charge the jury, that the act under which he was indicted, was repealed by the act of 1848; which provides, that all slave merchants, deal-

ers, &c., before he shall make sale of any slave, shall procure from the clerk of the county court, a license, for which he shall pay ten dollars, for each slave which shall be offered for sale by him, &c. This act prescribes the same penalty for selling without a license, as is prescribed by the act of 1846, and to be recovered in the same manner.

We think the act of 1846, is repealed by the act of 1848. The rule is, that a subsequent statute, will be a repeal of a former one, without express words of repeal, if the substance of the subsequent act, is inconsistent with the former. 2 Bibb. 96; 1 Ham. 10; 4 Wash. C. C. Rep. 691. It is true, that the law does not favor the repeal of statutes by implication, but if their repugnance to each other is apparent, the last must prevail, and this, necessarily works a repeal of the former law. Wyman et al. v. Campbell, 6 Porter 219.

The act of 1846, provides, that the slave dealer, shall pay five dollars for a license to sell each slave. The act of 1848, says he shall pay ten dollars for such a license; here is a plain and palpable repugnance; both acts cannot stand together: the former, therefore, must be repealed, and was not the law at the time of the trial.

It is, however, supposed that as the act of 1848, is similar in its provisions to the act of 1846, except in this particular, the defendant may be convicted, but the question is, under what act can he be convicted. He has not violated the act of 1848, and the act of 1846, is no longer in existence; nor is there any provision in the act of 1848, to punish those who had offended against the act of 1846. As the act under which the defendant was indicted, was repealed before his trial, he could not be convicted.

The circuit court erred, in not giving the charge requested, and the judgment must be reversed and the cause remanded.

THARP v. THE STATE.

1. Upon the examination of one charged with a criminal offence, the testimony of a witness was reduced to writing, *or so much thereof*, as the committing magistrate *considered material*, the accused being present, and cross-examining the witness. The witness died, and the minutes of the examination being lost, and not being found, either in the office of the magistrate, or in the court where the indictment was pending: held, that as only so much of the testimony, as the magistrate *deemed material*, had been committed to writing, he could not be called on to prove the substance of the testimony thus reduced to writing, without also proving what was omitted to be inserted. *Quere:* was there a sufficient predicate laid for the introduction of the secondary evidence, without proving, that the magistrate had returned the paper to the court, where the indictment was found?
2. When it is necessary to prove a guilty knowledge on the part of the accused, it is sometimes allowable to give evidence of other offences committed by him, though not charged in the indictment, as in the case of forgery, and uttering counterfeit coin.
3. When instructions to the jury actually given, are excepted to as mistaking the law, no part of the testimony need be stated, to authorize the appellate court to revise the case, upon the bill of exceptions.

Error to the Circuit Court of Barbour. Before the Hon. Geo. D. Shortridge.

This was an indictment against the plaintiff in error, for uttering and publishing counterfeit coin. At the trial, the state proved, that the prosecutor, John Hickman, had died, since his examination before the committing magistrate: that his testimony, or so much of it, as the committing magistrate thought material, was reduced to writing by him, in the presence of the defendant, who cross-examined the prosecutor: and that the testimony, thus reduced to writing, could not be found in the circuit clerk's office, in Barbour, nor in the circuit clerk's office of Henry county, to which a former indictment from Barbour had been carried, on change of venue, and quashed, nor in the office of the committing magistrate. Upon this predicate, the state offered to prove by the committing magistrate, the contents of the testimony of the deceased

prosecutor, as reduced to writing by him, to which the defendant objected, but the court overruled the objection, and allowed the magistrate to testify. The magistrate then gave evidence of the *substance of the contents* of the written testimony of the prosecutor, both on his (the prosecutor's) direct, and cross-examination; to which the defendant excepted.

The court charged the jury, that if it was proved, that the prisoner had passed other and similar spurious coin, that the law will raise the presumption, that the prisoner knew this particular piece to be spurious coin; to which charge the defendant excepted. The several rulings of the court, and the charge to the jury, are now assigned as error.

J. E. Belser and F. S. Jackson, for plaintiff in error.

1. The testimony objected to by the prisoner, in the court below, was inadmissible, because there was no record of the investigating trial before the court, when he was tried. 8 Johns. 446; 11 Johns. 128.

2. The court erred, in permitting the committing magistrate, to prove the testimony of the deceased witness. This evidence, under the circumstances, was inadmissible. Trawick's Case, 4 St. Trials; 5 Rand. 708; 1 Overton, 229; 1 Halst. 434; Clay's D. 26, § 10; ib. 449, 450, § 25, 27, 33.

3. But even if the evidence of the committing magistrate was competent, still it was inadmissible, according to the matters set forth in the bill of exceptions. United States v. Wood, 3 Wash. 440; Com. v. Richards, 18 Pick. 434; Warren v. Nichols, 6 Metc. 261; Jackson v. Loude, R. M. Charl. Rep. 38.

4. The court erred in admitting evidence of a part only, of deceased witness's testimony. The magistrate should have reduced all of witness's testimony to writing, and not such parts only as the magistrate considered material, and the court might have considered the rejected portion material.

5. The court erred in charging the jury, that the law raised the presumption of the prisoner's knowledge of the spurious nature of the coin. The fact that the prisoner had passed other and similar coin, was a circumstance from which the jury might, or might not, have come to the conclusion,

that the prisoner knew the coin, for which he was indicted, was spurious.

ATTORNEY GENERAL, for the State.

1. The law makes it the duty of the magistrate to reduce to writing the testimony of a witness, in a preliminary examination, in a criminal case. Clay's Dig. sec. 27, 449.

The testimony of Hickman (the deceased witness,) was regularly and judicially taken, and reduced to writing, as required by law, and was cross examined by the prisoner. This was sufficient then to allow his testimony to be read in any subsequent trial, in case of witness's death. Bryant v. Owen, 2 S. & P. 136; 15 Johns. 539; 1 Starkie, 368.

2. The testimony thus reduced to writing, could not be found in those places where it should have been kept, or was most likely to be found, and this was sufficient to admit the secondary evidence of its contents. Sledge v. Clopton, 6 Ala. Rep. 589.

3. And in that event, it is not necessary to give the precise words. The substance is all now that is required, and the tendency of modern decisions is to relax the strictness of the rule formerly; and to go further than this, it is said, would be to exclude this sort of testimony altogether. 1 Greenl. Ev. § 165, p. 263; 1 Phil. Ev. 388; 17 Verm. 638; 11 Gill & Johns. 173; 5 Rand. 36; 6 Watts & Serg. 51; 11 S. & R. 149; 10 ib. 15. That the substance only, and not the precise words of the deceased witness's testimony is all now that is required, has been decided by our supreme court. And the reason is there said to be the necessity of the case, and to prevent a failure of justice. Gildersleeve v. Caraway, use, &c., 10 Ala. 260.

4. There is no substantial difference, between the charge of the court, in relation to the passing other spurious coin, and the true rule, as laid down by writers on criminal law. Roscoe, 69; 1 Russ. 85; 2 ib. 697. If the charge as given, was considered objectionable, it was the duty of the party against whom it was to operate, to ask an explanatory charge of the court; and if this is not done, the court will not reverse the case, if the charge was substantially correct. The

State v. Brinyea, 5 Ala. Rep. 244; The State v. Flanagin, ib. 477; Caskey v. Haviland, Riley & Co. 13 ib. 314.

5. It does not appear from the bill of exceptions, what the evidence of the magistrate was, as to the deceased witness' testimony. If the plaintiff in error was prejudiced by the testimony of the magistrate, the bill of exceptions should have shown what the evidence was: otherwise, it will be considered error in the abstract, which is no error in law. Holmes v. Gayle & Bower, 1 Ala. 519; Schuessler v. The State, 3 ib. 419; Minor, 399; McCullough v. Fleming, 4 Ohio, 388; Woodsides v. The State, 2 Howard's Miss. Rep. 662. And the charge given by the court is abstract. There was no evidence in relation to the prisoner's having, before that, passed other spurious coin, disclosed by the bill of exceptions. The party taking the bill of exceptions, must embrace so much of the evidence on the trial, as to show that error to his prejudice has intervened. See same authorities as last cited.

6. The court will not intend that there were other facts than those stated in the bill of exceptions. Keath v. Patton, 2 Stew. 38; Pierson v. The State, 12 Ala. 149; Knapp v. McBryde, et al., 7 ib. 20; Johnson v. Ballew, adm'r, 2 Por. 32. The case is not altered by the charge being an affirmative one. McBryde and Wife, v. Thompson, 7 Ala. 654.

7. The objection to the magistrate's testimony was too general and undefined. The party objecting must particularize the ground upon which the objection is made, or the court may overrule the objection. Wallis v. Rhea & Ross, 10 Ala. 451; Snowden v. Warder, 3 Rawle, 191; Washington v. Younge, 4 Miss. 564.

COLLIER, C. J.—1. It is provided by statute, that the magistrate before whom any person is brought on a charge of having committed an offence, shall, as soon as may be examine the complainant, and the witnesses to support the prosecution, on oath, in the presence of the party charged, in relation to any matters connected with such charge, which shall be deemed pertinent: *Further*, the testimony of the witnesses examined, shall be reduced to writing by the magistrate, or under his direction, and shall be signed by the witnesses, if required by the magistrate. All examinations

and recognizances touching criminal offences, shall be certified by the magistrate taking the same, to the court at which the witnesses are bound to appear, on or before the first day of the sitting thereof; and if he neglect to make such return, he may be compelled by rule of court, and in case of disobedience, may be proceeded against by attachment. Clay's Dig. 449, 450, § 25, 27, 33.

The question arising under these several provisions, is, was the secondary evidence of the examination of the prosecutor, admissible on the trial of the prisoner in the circuit court? It is well settled, notwithstanding the declaration of the *magna charta* of England, and the constitutional provision of most, if not all the American states, that *in all criminal prosecutions, the accused shall be confronted with the witnesses, and have compulsory process to obtain the attendance of such as he may desire to testify for him*, that it is not *universally* essential to the admission of evidence against him, that the witnesses should be examined orally at the trial. The right thus secured to the accused, does not forbid the proof of the dying declarations of one who has been killed, against a party charged with his murder. Anthony v. The State, Meigs's Rep. 276; Woodsides v. The State, 2 How. Rep. (Miss.) 655. So, depositions taken before the examining court, in the presence of, and on cross-examination by, the prisoner; or even not in his presence, if he knew that the examination was being made, and had an opportunity, but declined to examine the witnesses, are received as evidence, if the witnesses are dead. Bostick v. The State, 3 Hump. 344; The State v. Campbell, 1 Richard. Rep. 124. See also U. S. v. Wood, 3 Wash. C. C. Rep. 440; The State v. Atkins, 1 Overt. Rep. 229; Scott v. Wilson, Cooke's Rep. 315; Rex v. Barber, 1 Root's Rep. 76; State v. Hooker, 17 Verm. Rep. 658.

It has been decided, that it is not allowable, in a criminal proceeding, to prove what a witness, who has only removed out of the jurisdiction of the court, testified on a previous trial of the same case. Finn v. The Commonwealth, 5 Rand. Rep. 701; The People v. Newman, 5 Hill's Rep. (N. Y.) 295.

In Clark v. Vorce, 15 Wend. Rep. 193, the defendant of-

fered to prove the testimony of H. a *deceased witness*, given on a former trial of the cause, and called a witness, who stated, that on the previous trial, he had acted as counsel for the defendant, and took full and particular minutes of H.'s testimony; that he intended, at the time, to take down the words of H., but could not pretend to give his precise words; that he could not swear to H.'s testimony, except from the minutes taken by him on that trial; and could not now testify that he had taken down every word of his testimony, but he intended, at the time, to take down all he regarded as material. The supreme court said, the notes of the testimony should have been received, connected with the counsel's oath as to their accuracy. "It was his intention, at the time, to take down the words of the witness—not the substance, or legal effect, of his testimony. The reason assigned in 4 Ser. & Rawle, 203, against receiving the notes of the counsel, is not applicable to this case. Here, it was the intention of the witness to take down, not the substance, but the words, of the witness. The offer, in this case, comes within the rule, as stated in Williams v. Selden, 6 Cowen, 164. The witness was ready to swear to his belief of the accuracy of his minutes, and it was his intention to take down the words of the deceased witness."

We have heretofore decided, that it is allowable to prove what a deceased witness stated on a former trial of the same cause, between the same parties; and said that it was sufficient, in such case, to state the whole of the substance of what the deceased testified, though his precise words are not recollected. Gildersleeve v. Caraway, 10 Ala. Rep. 260; Sloan v. Somers, 1 Spencer's Rep. 66; Garrott v. Johnson, 11 Gill & Johns. Rep. 173; Smith v. Natchez Steamboat Co. 1 How. Rep. (Miss.) 479; Moore v. Pearson, 6 Watts & Serg. Rep. 51. But a witness offered to prove, what was deposed to on a former trial between the same parties, by a person who is dead, must give the *substance*, not the *effect*, of the testimony. Ballenger v. Barnes, 3 Dev. Rep. 460; Bowie v. O'Neale, 5 Har. & Johns. 226; Wolf v. Wyeth, 11 Serg. & R. Rep. 149.

In the case at bar, the prosecutor died after his examination before the committing magistrate, and the magistrate

testified at the trial, that his testimony, or so much as he considered material, was reduced to writing, by him, under the statute; that the defendant was there, and cross-examined. It was also proved, that the written examination of the deceased witness, could not be found in the office of the clerk of the circuit court of Barbour, nor in the office of the clerk of the circuit court of Henry, to which a former indictment in this cause had been removed, by a change of venue: *Further*, that the written examination could not be found in the office of the committing magistrate. Upon this state of facts, the magistrate was allowed to prove the *substance of the testimony of the prosecutor thus reduced to writing by him.* We think this evidence was improperly admitted. Perhaps, the preliminary proof did not lay a sufficient predicate for the introduction of the secondary testimony. Although, as a general rule, the law presumes all public officers perform the duties devolved upon them, until the contrary appears, we incline to think, that this presumption cannot be indulged, in the present case; but it should have been shown, that the written examination was actually returned, as the statute requires, or that it could not only, not be found in the magistrate's office, but that he did not know where it was. We will not affirm that the rule should be thus rigidly applied, but if it is not, inferior evidence might be adduced, when higher is attainable. It does not appear, that the entire examination of the prosecutor was reduced to writing, but only so much as the magistrate believed to be *material*, and that he only professed to state the substance of what was written down. The statute directs *the testimony of the witnesses examined, to be reduced to writing*, not a part of it, but all, if not in their own words, at least so as to preserve, with exactness, the sense, and meaning, of the words used. It is not permissible for the magistrate to determine what portion of it is *material;* if the testimony is legal, and has been received by him, his duty is plain, and defined. If he attempts to discriminate, and omits some part of the evidence, the accused cannot be prejudiced, by having an incomplete recital of it read as evidence against him, unless, perhaps, the omitted part can be proved. The recognition of a more relaxed rule might cause the conviction of a party upon evidence, the ef-

fect of which might be materially modified, by the addition of what the magistrate deemed unimportant. If, then, the writing itself would not be admissible, without proof of the testimony not embraced by it, it follows, that secondary evidence of its contents should not be received, without proving what was omitted to be inserted in it. This conclusion seems necessarily to flow from the legal requisition that the *substance*, not the *effect*, of what the *deceased witness* testified, must be proved. Whether the part of the testimony not reduced to writing, could be proved by the justice, even if his recollection would enable him to state it, is a question not presented by the record, and we will not therefore decide it in advance. If, however, he would say, from his own recollection, that the lost writing set out all that the prosecutor deposed to, then the proof of its contents would be sufficient.

2. When it is necessary to prove "a guilty knowledge" on the part of the accused, it is sometimes allowable, to give evidence of other offences committed by him, though not charged in t he indictment. Thus, if one be indicted for uttering a forged bank-note, knowing it to be forged, it may be shown, that other forged notes were uttered by the prisoner, for the purpose of showing his knowledge of the forgery. So, upon a charge of uttering counterfeit money, proof is received, (for the same purpose,) that there was more than one uttering, of similar coin, by the party about the same time, though but one is alleged in the indictment. 2 Russ. on Crimes, 697 and citations in notes; The State v. Robinson, 1 Harr. Rep. 507; The State v. Petty, Harper's Rep. 59; 4 Dev. 606.

The charge of the circuit court upon this point, affirms, that if it was proved, that the prisoner passed other and similar spurious coin, the law would raise the presumption, that the prisoner knew the coin which he was charged with having uttered, was spurious. This goes quite beyond the rule, as we have deduced it from the books. The jury were informed, that the fact of the prisoner having passed the counterfeit coin, being shown, it was *a legal presumption*, that he knew the character of the one, which the indictment charged him with having uttered. Thus assuming, as a conclusion of law, the guilty knowledge of the prisoner, merely because he

passed other similar coin which was spurions. The court invaded the appropriate functions of the jury forestalled their inquiries, as to the *scienter*, which was properly referable to them, and an indispensible element in determining the prisoner's guilt. It should have been submitted to the jury to determine, whether upon a view of all the circumstances, the previous knowledge that the coin was not genuine, was established. The proof would be stronger or weaker, according to the circumstances, time, when, &c., under which the *other coins* were passed. All these considerations, we have seen, were excluded from the jury.

It is however, insisted for the state, that as none of the evidence is set out in the bill of exceptions, the charge of the circuit judge must be considered as abstract, and does not authorise a reversal of the judgment. This argument cannot be supported. In Peden v. Moore, 1 Stewt. & P. Rep. 71, it was said, "where an exception is taken for a refusal to instruct, the bill must embrace so much of the evidence as to show, that the instructions asked for, arose out of the cause: but where instructions actually given are excepted to as mistaking the law, no part of the testimony need be stated, to authorise the appellate court to revise the case upon the bill of exceptions: and this distinction is founded upon the presumption, that whatever is done in a court of justice, will be presumed to be legally done, until the contrary appears. This view of the law, has been followed in all our subsequent decissions, and we are still willing to adhere to it.

It follows, that the judgment of the circuit court of Barbour must be reversed and the cause remanded. That the prisoner may be committed to the proper custody, the clerk of this court will issue a mandate, addressed to the sheriff of Barbour county, embracing therein, the judgment of this court, ordering him to demand the prisoner of the warden, or lessee, of the penitentiary, and requiring the warden, or lessee, to deliver the prisoner to said sheriff, upon being furnished with a copy of the mandate, and a receipt at the foot thereof, acknowledging such delivery: and commanding the said sheriff, to transfer the prisoner to the jail of his county, for safe keeping, until he shall be discharged by due course of law, or regularly removed to some other place of trial, or confinement.

DOLIN v. GARDNER.

4. To admit a deed to record, on proof of a subscribing witness, it must appear from the probate, that the witnesses subscribed in the presence of the maker of the deed, and in the presence of each other; and on the day and year mentioned in the deed.
2. When a purchaser of land, asserts title by a conveyance, made after judgment was obtained against his vendor, before a justice of the peace, as against the judgment creditor, he must prove that he is not a volunteer, but that his conveyance is upon valuable consideration.

Error to the Circuit Court of Lowndes. Before the Hon. Ezekiel Pickens.

This was an action of tresspass, to try titles to several parcels of land, brought by plaintiff against defendant in error, and to recover damages. By a bill of exceptions, it appears, that plaintiff introduced, in evidence, three different executions, issued on judgments rendered in a justice's court, of Lowndes county, on the —— day of ——— 1841—one against John W. Bennett and Irvin Walker, one against Hays Walker, and the other against Irvin Walker. Each of these executions issued on the 10th Oct. 1844 and were on the same day levied by a constable, for want of personal property, on the lands in controversy. The plaintiff then produced in evidence, the records of the circuit court of Lowndes, at its fall term 1844, ordering a sale of the lands levied on under the executions, and the three writs of *venditioni exponas*, issued on said order, on the 18th Nov. 1844, commanding the sheriff to sell said lands. He also proved, and read the deed of the sheriff to him, for said lands, dated 6th January, 1845, and possession by the said Irvin Walker and Hays Walker, of a part of the lands previous to the sale, and possession by the defendant at the date of the writ. The defendant introduced a patent to Irvin Walker and Hays Walker, for a part of the land sued for; a deed from them to Owen Halford, dated Feb. 14th 1844, and recorded on the affidavit of a subscribing witness, who swore, "that he saw the grantors sign,

seal and deliver, the within deed, to the within named Owen Halford, on the day and date therein written, and that he signed the same as a witness, and that he saw L. W. Ramsey and Joseph Halford, sign as witnesses:" and a deed from Owen Halford, to the defendant, dated 31st Oct. 1844, at the bottom of which, there is a covenant warranting the title to the grantor, executed by Redding Halford and Williamson Harrison, and an acknowledgment by said Redding Halford and Williamson Harrison, before a justice of the peace, "that they signed, sealed and delivered the above warranty, to the above named D. Gardner, (the defendant) on the 1st day of March, 1844." There was no proof of the execution of the deed by Owen Halford, and no other probate than the above, though it appeared to have been recorded. The plaintiff objected to the introduction of the deed of the Walker's to Owen Halford, and of Owen Halford to defendant, without further proof, but the court overruled his objection, and charged the jury, that the better title was with the defendant, and that the plaintiff could not recover. The plaintiff excepted to this charge, and now assigns it, and the rulings of the court as error.

Elmore, for plaintiff in error.

1. The deed of the Walkers to Halford was erroneously admitted by the court. The probate is almost identical with that in Brock v. Headen, 13 Ala. 370.

2. There was no probate at all to the deed from Halford to Gardner. There was an acknowledgment by another Halford, and Harrison, that they guaranteed the title. The court below totally misconceived the facts, and law.

3. The plaintiff proved the existence of the debts, and judgments on them, against the Walkers, the grantors, before the transfer or conveyance of the land by them to Halford; and this required the defendant to show the purchase by Halford for a valuable consideration, and in good faith, or a purchase by Gardner from Halford for like consideration, and in good faith, but the court overlooked this, and pronounced on the facts. McCain v. Wood, 4 Ala. 258.

J. B. Stone contra.—1. The probate, if it does not follow the

exact form of the statute, contains, at least, the substance, and therefore, is unobjectionable. Clay's Dig. 153, § 9.

2. The case relied on by the plaintiff in error, in 13 Ala. R. 370, is unlike the present; the deed, in that case, was a deed of trust to secure creditors: the deed, in the case at bar, is an absolute conveyance of real estate.

3. The case cited by the plaintiff in error, from 4 Ala. R. 258, is also distinguishable from the present, it being a trust deed to secure creditors.

CHILTON, J.—The act of 1812, Clay's Dig. 152, § 7, requires the witness who proves a deed for registration, to swear to the subscription of all the parties, setting out their names; that the witnesses subscribed in the presence of the maker of the deed, and in the presence of each other, and on the day and year named in the deed; and in Phipps v. McGehee et al. 5 Por. Rep. 434, it is said, the substance of the form prescribed by the statute, must be pursued. See also Brock v. Headen, 13 Ala. Rep. 370; Shelton v. Armor et al. ib. 652. The certificate on the deed from the Walkers to Halford, does not conform to the statute, as it fails to show that the witnesses subscribed in the presence of each other, and in the presence of the maker. This may appear as useless *formula;* but it is a requisition of the statute law of the state, and the courts are bound to observe it, so long as the legislature chooses to continue it in force. The case of Bradford v. Dawson et al. 2 Ala. Rep. 203, does not militate against the view here taken. The deed from Owen Halford, to the defendant, was not certified, either as acknowledged, or proved. The certificate refers merely to a covenant of warranty, indorsed upon it by third persons, not parties to the deed. Its admission, against the plaintiff's objection, there being no proof of its execution, was clearly erroneous.

The controversy in this case, was between a *bona fide* creditor, who had purchased the land under orders of sale, in satisfaction of his debt, and one who derived title through the debtor, by conveyance executed subsequent to the rendition of the judgments before the justice. In such case, it is the settled law, that the purchaser, in order to defeat the creditor, must show that he holds *bona fide*—that he is not a

volunteer, but that his conveyance is upon a valuable consideration. The bare recitals in his deed, in such case, are not sufficient. Bank v. Kinsey, 5 Ala. Rep. 12; Falkner v. Leath and Jones, at the last term. No such proof having been adduced by him in this case, the court erred in charging the jury, in effect, that his title was paramount to that of the plaintiff.

Let the judgment be reversed, and remanded.

NOTE BY THE REPORTER. For the form of the certificate of deeds of trust—see Hobson v. Kissam & Co., 8 Ala. 357.

HEIRS OF BISHOP v. HAMPTON.

1. A report by an administrator of an estate, to the orphans' court, *that the estate was solvent, and that it would be of infinite benefit to the heirs of said estate, to sell, without delay, the real property of said estate*, does not confer jurisdiction on the court, to order a sale of the real estate, and a sale made pursuant to such order, does not divest the title of the heir.
2. The petition of an administrator for the sale of land, being lost, or mis laid, the testimony of the judge of the court cannot be received, that the petition was in fact different from the recital of it in the orders of the court, setting forth the grounds set forth in the petition, for the sale of the land.

Error to the Circuit Court of Benton. Before the Hon. S. C. Posey.

THIS was an action of trespass to try titles, brought by the plaintiffs in error, against the defendant, in the circuit court of St. Clair, and was removed by change of venue, to Benton. The plaintiffs, to show title in themselves, proved, that their father died seized of the premises. The defendant read to the jury, a transcript of entries, and proceedings, in the orphans' court of St. Clair. The first is the appointment of Joel Chandler, administrator of the estate of Hiram G. Bishop, who was the father of plaintiff: this order bears date 29th September, 1835; and at the same time, an order was made, that the administrator sell all the personal property of the

deceased. The next order is in the following language: "Orphans' court, 11th March, 1836. This day came Joel Chandler, administrator of Hiram Bishop, deceased, and makes report to the court, that said estate is perfectly solvent, and that it would be of infinite benefit to the heirs of said estate, to sell, without delay, the real estate belonging to said estate. It is therefore ordered, that his petition be received, and an order of sale be made." Then follows an order, that publication be made in the Huntsville Democrat, requiring all the legatees, and other persons interested in said real estate, on the first Monday in May then next, to appear, and show cause, why the sale of said land should not be ordered.

The next order bears date the 2d July, 1836, and recites, that Joel Chandler, administrator, had filed his petition in the orphans' court, on the 11th March, 1836, for the sale of the real estate of Hiram G. Bishop, and forty days' notice having been given in the Huntsville Democrat, and no cause being shown why said real estate should not be sold, "it is therefore ordered, that said tract of land, described in the administrator's petition, shall be sold on the first Monday in September next, and that Samuel Souls, Jeremiah Gregory, and James Anderson, be appointed commissioners to superintend the sale of the same, in all things, pursuant to the requisites of the statute. No further proceedings appear of record, until the first Monday in September, 1847, when the following order was made: It appears to this court, that heretofore, on the 24th July, 1836, on the petition of the administrator of Hiram Bishop, deceased, filed for that purpose, this court ordered and decreed the sale of the land of Hiram Bishop, and appointed James Anderson, Samuel Souls, and Jeremiah Gregory, commissioners to make such sale; and the report of Jeremiah Gregory, and Samuel Souls, two of the commissioners, coming in, showing the sale of said real estate, according to said order, and decree, and no final decree having been rendered in the case, said report is here referred to, and made part of this entry; and it appearing to the court, that Joel Chandler, sr., was the purchaser of said real estate, and that the terms of said sale have been complied with, by the said purchaser; and it appearing that James Anderson, the

other commissioner, has removed to parts unknown, and that the purchaser has departed this life: upon the motion of a party interested, it is ordered, and decreed, that said report be confirmed, and that the said two commissioners, who made said sale, as above, convey said real estate, sold as aforesaid, as set forth in the report, to said purchaser; and that such conveyance take effect, and be operative, just as if this final decree had been made, and the conveyance executed in the life-time of the purchaser.

The report of the two commissioners, bears date the 6th September, 1847, and states, that in pursuance of the order, they sold the real estate, (describing it,) on the first Monday in September, 1846, after having advertised it for sale for forty days in the Huntsville Democrat, at public auction, to Joel Chandler, for $1710, he being the highest and best bidder, which report is signed by the two commissioners. The defendant also read a deed from the three commissioners, bearing date in July, 1837, to Joel Chandler, for the land in controversy, which expresses the consideration of $1710, and acknowledges the receipt of it by the commissioners: also another deed, executed on the 6th of September, 1847, by the two commissioners, to said Chandler, for the same land, and on the same consideration. The defendant then read a deed from Joel Chandler, to himself, bearing date the 26th December, 1838.

The defendant introduced as evidence, the deposition of James Rogan, who testified, that he had been judge of the county court of St. Clair county, from 1833, until 1845; that Joel Chandler, the administrator of Hiram Bishop, during the time he was judge, filed his petition to the said court, praying for an order for the sale of the lands; that he cannot recollect, *verbatim*, the petition, but thinks that the petition set forth, that the estate was solvent, but that the lands cannot be fairly, and equally divided amongst the heirs, without a sale, and that the heirs were all minors. That he cannot tell where said petition now is; that it was in the clerk's office. On cross-examination, he stated, that all the orders, made during the time he acted as judge, were, to the best of his recollection, entered of record, according to the facts, to the best of his knowledge. To the reading of this deposition,

the plaintiff objected, but the objection was overruled. The defendant also proved, that the said petition could not be found, after a thorough examination of the clerk's office.

The plaintiff requested the court, to exclude from the jury, the order of sale of said lands, and all the orders in reference thereto, but the court refused: also, the report of the commissioners, which the court refused.

The court charged the jury, that if they believed the evidence, they should find for the defendant; to which the plaintiff excepted.

The several rulings, and charge of the court, are now assigned as error.

J. B. Martin, for plaintiffs in error.

1. The orphans' court is one of special, and limited jurisdiction. The statute authorizing its action, must be strictly pursued; and that this has been done, must be shown by the record of its proceedings, else they are not irregular, and voidable merely, but are absolutely void. Taliaferro, adm'r, v. Thompson, 3 Ala. 670; ib. 623; Wiley et al. v. White and Leslie, 3 Stew. 331; 8 Por. 375; Lakin v. Hudson, 6 Cowen, 224; 15 Johns. 141; 6 Wheat. 119; 7 Wend. 148; Bloom v. Burdick, 1 Hill, 139; 4 Wheat. 77; 12 Ohio, 271; Blann, guardian, v. Grant, adm'r, 6 Ala. 110; 11 Mass. 507; 7 Wendell, 148.

2. We are to look to the orders of the judge, they being a portion of the record, to ascertain the facts presented to the court, and upon which the court acted, and not to the uncertain recollection of a witness, as to matters which occurred ten years prior to the date of his testimony.

3. The authority, and power, of the commissioners, was exhausted by a sale of the land, and hence their deed to Chandler, of the 14th July, 1837, (no report having been made to the court, nor decree of affirmance, and order to convey by the same,) did not convey to the purchaser a title, and consequently, left in the heirs. Cooper v. McCullough's adm'r, 5 Ala. 324, particular p. 337; 1 Ala. 475; 1 Hill, 142; 13 Wendell, 165; 20 ib. 241; 7 Cowen, 88.

4. The second deed cannot defeat the right of the plaintiffs to recover in this suit, made, as it is, to a dead man, and

long after the commencement of this suit. 2 Greenl. Ev. 251; Hamleton v. Taylor, Littell's Sel. Ca. 244; Adams on Ej. 32; 9 Porter, 349.

5. The final decree, made by the judge of the orphans' court, 7th September, 1847, founded upon the report of two, of the three commissioners, appointed ten years anterior to their report, with none of the parties adverse in interest before the court, and using no means to give them notice, and that, too, after the commencement of this suit, will not be recognized as changing the rights of parties. Authorities before cited as to notice, and McCurry v. Hooper, 12 Ala. R. 823. Neither is it good as a judgment *nunc pro tunc.* 1 Bac. Ab. 251, F; Wilkerson v. Goldthwaite, 1 Stew. & Por. 167; 2 Ala. 29; 9 Porter, 252; 2 Stew. 470; 3 Ala. 281; 10 ib. 375; 3 Smedes & Marsh. 234. Judgments which are allowed to be amended, must be in a reasonable time. 3 Ham. 486; 1 ib. 375, (Ohio); 9 Johnson, 556; 2 Bay. Rep. 388.

Rice & Morgan, contra.

1. The motion to suppress the deposition of Rogan, was predicated on facts, that the plaintiffs might have availed themselves of, on cross-examination, but which they failed to do. The answers were full, and the witness examined in chief in reference to the exhibits attached to his answer, and without any objection taken previous to the trial.

2. Parol proof of a lost record, is admissible. Ravenscroft v. Gibony, 2 Miss. 1; 3 Phil. Ev. 1066; 1 Greenl. Ev. § 509; Ansley v. Carlos, 9 Ala. R. 973; Duval v. McLoskey, 1 Ala. 711; McCartney v. Calhoun, 11 Ala. 118; Duval v. Bank, 10 Ala. R. 636.

3. The jurisdiction of the orphans' court is complete; all the requirements of the law were fulfilled, and the sale was the act of the court. Duval v. McLoskey, 1 Ala. R. 711; McCartney v. Calhoun, *supra;* Jennings v. Jenkins, 9 Ala. 285; Lightfoot v. Lewis, 1 Ala. 475. And the proceeding being *in rem*, the final decree is conclusive against all persons, especially when brought in question collaterally. U. S. v. Aredondo et al. 6 Peters, 709-729; Bank v. Hodges, 12 Ala. R. 121; Tryon v. Tryon, 16 Verm. R. 313; Duval v.

Bank, 10 Ala. R. 636. McCurry v. Hooper, 12 Ala. R., does not apply here, as, in that case, the court had no jurisdiction, either *in rem. or personam.*

DARGAN, J.—As the plaintiffs showed, that their ancestor died seized of the lands sought to be recovered it became necessary for the defendant to show, that they had been divested of their title. For this purpose, he introduced a transcript of proceedings, had in the orphans' court of St. Clair, from which it appears that Joel Chandler, in the year 1835, was appointed administrator of the estate of Harris G. Bishop deceased, who was the father of the plaintiffs, and from whom they derived title. It also appeared, that on the 11th of March 1836, the following order was made : " This day came into court, Joel Chandler, administrator of Harris Bishop, deceased, and makes report, that the estate is entirely solvent, and that it would be of infinite benefit to the heirs of said estate, to sell without delay, the real estate belonging to said estate. It is, therefore, ordered that said petition be received, and the order of sale made." At the same time, publication was ordered to be made, in a newspaper, published in Huntsville, requiring the legatees, and all persons interested, to appear before the court, on the first Monday in May next, and show cause why said order should not be granted. On the 24th of July 1836, another order appears, which recites, that the publication had been made, and no cause being shown why the land should not be sold,—it is therefore ordered, that the lands described in the administrator's petition, be sold, on the first Monday in September next. The order then appoints three persons to superintend the sale, and to conduct it according to law. Nothing more appears, on the record, until July, 1847. Two of the commissioners then report, that they had sold the land on the day appointed, and that Joel Chandler became the purchaser, for the sum of seventeen hundred and ten dollars. They make also, as a part of their report, a deed executed by them of that date, to Joel Chandler, which expresses the receipt of the purchase money, by them. This report was confirmed by the orphans' court, and the two commissioners then executed another deed to Joel Chandler, for the same land, having the same date as their report. It was

shown, however, that Chandler had died before the report was made, and before the execution of the deed.

The jurisdiction of the orphans' court, over the lands of a decedent, is derived solely from our statute, and the mode of exercising that jurisdiction, is prescribed by statute. The question, whether the title of the heir has been defeated by a sale, under decree of the orphans' court, always depends on the fact, whether the court decreeing the sale, had jurisdiction of the subject matter. If it had, the title of the purchaser is not affected by mere irregularities in the proceedings: if it had not, the judgment, or decree, which is the source of the title of the purchaser, is a mere nullity, and no title can be derived from it. But in determining whether the court had jurisdiction, or not, we can look alone to the record: the facts that give the court jurisdiction, must appear on the record, or the judgment or decree pronounced, is without authority, and void. Wyman v. Campbell, 6 Porter, 219; Couch and Robinson v. Campbell, ib. 262; Duval's Heirs v. McLoskey, 1 Ala. 710; McCartney v. Calhoun, 11 Ala. 110; Thompson v. Tolmie, 2 Peters' 157. Applying this rule of law, to the record of the orphans' court of St. Clair, as exhibited to us, by the transcript of its orders, and we are compelled to say, that the court had no warrant, or authority from any fact contained, or recited in the record, to decree a sale of the land.

The act under which these proceedings appear to have been had, is in the following language: "It shall be lawful for an administrator of any deceased intestate, or an executor of any deceased testator, who has not by will, authority to sell real estate, for the purpose of paying the debts, or to make a more equal distribution amongst the heirs, devisees, or legatees, to file a petition in the orphans' court of the county, in which letters of administration, or testamentary, have been granted, setting forth, that the personal estate is insufficient to pay the debts, or that the real estate cannot be equally, fairly, and beneficially divided between the heirs, legatees, or devisees, without a sale thereof," &c.

If the jurisdiction of the orphans' court, cannot be sustained under this act, there is no other, that we can look to, which would authorize the court, in decreeing the sale of the land.

We find, however, that under this act, the court can only proceed to order a sale: first, when the executor, or administrator, files his petition, setting forth that the personal estate is insufficient to pay the debts; or secondly, when an equal, fair, and beneficial division amongst the heirs, or devisees, cannot be made without a sale. The one, or the other of these two facts must exist; that is, the personal estate must be insufficient to pay the debts, or it must be shown, that the division could not be equally, fully and beneficially made, without a sale, before the court can claim authority under this statute, to order the land to be sold.

The record produced, neither shows that a sale was necessary to pay the debt, nor to make a distribution. It recites that the administrator makes report, that the estate was solvent, and that it would be of infinite benefit to the heirs, to sell the real estate. No fact, or circumstance, recited in this order, gives the court jurisdiction to order the sale. The jurisdiction of the orphans' court, over the lands of the decedent, is not a general, but a special, or limited jurisdiction, and can only be legally exercised, whon those circumstances are shown to exist, which give the court power to act. And although, in the opinion of the administrator, it may be beneficial to the heirs, to sell the real estate, yet this gives the court no authority to order a sale, even if the judge fully concurred with him in opinion.

It is however, contended, that the testimony of the county judge should be received, to supply the defect of jurisdiction, apparent on the face of the record; he testified, that the administrator filed a *written petition*, in court, praying a sale, in which it was averred, that the lands could not be equally, fairly and beneficially divided, without a sale. This petition is lost, and cannot be found after the most diligent search.

We feel no hesitation in saying, that this testimony of the county judge, should not have been received to show, that the contents of the petition differed in fact, from the recitals of it, contained in the orders of the court. The orders of the orphans' court, in reference to the sale of decedent's land, should show the grounds on which they are made, and their recitals, showing that a petition has been filed for this purpose, and setting out the substance of the petition, is evi-

dence of those facts. In the case of Duvals's heirs v. McLoskey, 1 Ala. Rep. 709, we held, that a decree of the orphans' court, ordering the land of a decedent to be sold, was not viod, because the petition was not produced, but that the recitals in the order, that a petition was filed, and which showed the ground on which the land was sought to be sold, was sufficient to sustain the jurisdiction of the court, and the decree directing the sale.

The orders of the orphans' court, in this case, shows that a petition was filed; they also show, the ground set forth in the petition, for the sale of the land. In the absence of the petition they are evidence of those facts. But we are asked to allow parol proof, to give a different version, as well as a different legal effect, to the petition, than the *record affords*. This, we think, would be a violation of a plain principle of law; it would be to permit parol proof, to vary the effect of a record; for the best evidence of what the petition contained, is the record. The orders show, when the petition was filed, and what it contained; they were made by one whose duty it was to make them, and we cannot permit them to be contradicted by testimony, dependent on the feeble memory of man.

This view is sufficient to dispose of the case, as it now stands before us, and we are unwilling to anticipate questions, that may hereafter arise, and we deem it unnecessary at this time to examine the other questions, growing out of the assignment of errors.

Let the judgment be reversed and the cause remanded.

GILBERT v. BRADFORD.

1. An effort being made to establish, that G. had obtained a decree in bankruptcy, fraudulently, G. offered to prove, that six months before the institution of the proceedings in bankruptcy, one Shannon applied to him to borrow money; that G. informed him he had none of his own, but had

some belonging to one Simmons, which he had no doubt Shannon could get, if Simmons did not want it. At the termination of this conversation, Simmons rode up, and G. handed him a roll of money, supposed to be $100: held, that this testimony was properly rejected.

2. The creditor proved, that G., the year he applied to be declared a bankrupt, had hauled with a dray, and team, managed by a slave named H., a large quantity of wood, which he sold for a considerable sum of money. To rebut this, G. offered to prove, that one S., at the time said hauling was done, had declared in his, G.'s presence, that the hauling was done on his, S.'s account: held, that the declarations of S. were properly excluded.
3. The creditor having proved, that one S., a few years after the bankruptcy, hired two slaves of L. G., who represented himself as the agent of the bankrupt in hiring the slaves, and that S. subsequently paid a part of the hire, as hire to the bankrupt, and the residue to another person: held, that this testimony was competent, there being no specific objection to that portion of it, which established the agency of L. G.
4. When a bankrupt's discharge is impugned for fraud, the creditor may prove the possession of the property by the bankrupt four years after the bankruptcy, and the jury must determine whether the property was fairly acquired, or by a fraudulent concealment of his effects.
5. Where an execution against G., is levied on slaves, which are claimed by S., upon a motion to quash the execution by G., S. having departed this life, a son of S., and joint legatee of his estate, is an incompetent witness for G.

Error to the Circuit Court of Autauga. Before the Hon. George Goldthwaite.

This was a motion, on the part of plaintiff, against defendant in error, to quash an execution, issued on a judgment rendered in favor of the defendant, against the plaintiff, on the 3d October, 1838, and also a levy made thereon, in April, 1848, upon the ground, that on the 22d October, 1842, he filed his petition for the benefit of the bankrupt act, upon which, he, in the due course of proceeding, was duly declared a bankrupt, and received a certificate of final discharge from his debts, &c. The defendant contested, and suggested fraud on the part of the plaintiff in said proceedings, in the wilful, and fraudulent, withholding of the property, at the time of his application, from the schedule which he filed.

On the trial of the issue made up between the parties, the plaintiff offered to prove by one Shannon, that he, Shannon, in the spring of 1842, had applied to plaintiff to borrow some

money, when plaintiff told him he had no money of his own, but had money of Maj. Simmons's, for wood he had sold for him, and that if Maj. Simmons did not want it, he had no doubt he could get it; that this conversation having terminated, Maj. Simmons immediately after drove up, when plaintiff handed a roll of money, probably about $100, to him, and that Maj. Simmons remarked, it had come in good time. To this testimony, the defendant objected, and the court excluded from the jury, all that plaintiff said to witness before Maj. Simmons rode up. It was proved by the defendant, that the plaintiff, in 1842, had hauled, with a dray and team managed by a slave named Hardy, a large quantity of wood, which he sold for a considerable sum of money, and to rebut this, the plaintiff offered to prove, that the witness had heard Maj. Simmons say, in the presence of the plaintiff, that the plaintiff was hauling, in 1842, the said wood on his, Maj. Simmons's account. The defendant objected to this evidence, and the court excluded it from the jury. The defendant proved, that one Shelby, in 1845, hired slaves, John and Hardy, from one Lemuel Gilbert, who then represented himself, as hiring the slaves as the agent of plaintiff, and that Shelby subsequently paid a portion of the hire to the plaintiff, who received it as hire, and another part of the hire to W. L. Yancey, Esq. The plaintiff objected to this testimony, but the court overruled the objection.

The defendant also proved, that within two weeks preceding the trial of the cause, the plaintiff had said to the witness, that he had made eighty bags of cotton in Louisiana, with six poor hands, and had hired four others, to help him pick it out. The plaintiff objected to this testimony, but the court overruled the objection. The plaintiff offered, as witnesses in his behalf, Frances Simmons, and William Simmons, but it being made to appear to the court that Major Simmons was dead, and the first named witness was his executrix, and as such, had interposed a claim to the property levied on under the execution sought to be quashed, which was still pending, and that both she, and the other witness, were legatees of said Major Simmons, the court, on motion of defendant, excluded them from testifying.

To the several rulings of the court, the plaintiff excepted, and now assigns them as error.

Elmore & Yancey, for plaintiff in error.

1. The declarations of E. W. Gilbert, plaintiff below, made to witness Shannon, that he had no money but what belonged to Simmons, and made immediately preceding the delivery to Simmons by said Gilbert of a roll of money, were wrongly excluded from the jury: 1. Because declarations of a party in possession of property, are admissible to show the character of that possession. Oden v. Stubblefield, 4 Ala. R. 40; McBride v. Thompson, 8 ib. 652; Spence v. McMillan, 10 ib. 583; Webster v. Smith, ib, 429; Abney v. Kingsland & Co. ib. 355; Beal v. Ledlow, 14 ib. 523. 2. Because they there against his interest, at the time they were made. Bliss v. Winston, 1 Ala. R. 344; Webster v. Smith, 10 ib. 429; 1 Phil. Ev. 255, 257. 3. Because they constitute a part of the *res gestæ*. Bohannon v. Chapman, 13 Ala. R. 646; Bliss v. Winston, 1 ib. 344; 2 Phil. Ev. C. & H.'s Notes, n. 444, 452, 481.

2. The declarations of Simmons, in the presence of Gilbert, in 1842, that the wood then being hauled by the latter, was his, Simmons's wood, was wrongly excluded from the jury, there being evidence then before them, tending to prove, that the land from which the wood was cut, and the teams and slaves who hauled it, belonged to Simmons: 1. Because, being an assertion of ownership, acquiesced in by Gilbert, long previous to the institution of this cause, it was against his then interest. See authorities quoted above. 2. It was part of the *res gestæ*. Spence v. McMillan, 10 Ala. Rep. 588; Stark. Ev. 47.

3. The declarations of one Lemuel Gilbert, at the time of hiring certain slaves, that he was the agent of E. W. Gilbert, the plaintiff below, were wrongly admitted to be proven by the defendant: 1. Because the fact of agency must be proven *aliunde*, before his declarations can be received. 2 Phil. Ev. C. & H.'s Notes, 188-9; Strawbridge v. Spann, 8 Ala. R. 825-6; Scott v. Crane, 1 Conn. 255; Scarborough v. Reynolds, 12 Ala. 259. 2. No declarations can be given in evidence, when the party making them, can be examined as a

witness, unless a part of the *res gestæ*. 1 Starkie, 390; B'k of Ala. v. McDade, 4 Porter, 270; Bradford v. Haggerty, 11 Ala. 701; 7 Cranch, 390; 3 Term, 708. 3. Because, there was no subsequent ratification of the act by E. W. Gilbert, that does not, with equal propriety, make Lemuel Gilbert agent of W. L. Yancey, as well.

4. The declarations of E. W. Gilbert, made just before the trial, of the amount of his cotton crop, and negro force, in Louisiana, during the year 1847, were irrelevant, and should have been excluded. Petty v. D. & J. Walker, 10 Ala. 379.

5. The rejection of Wm. Simmons as a witness, on the ground of incompetency, was error; his interest was contingent, and remote, and went only to his credit. 1 Phil. Ev. 46-7, 55, 52; 2 Phil. Ev. C. & H.'s Notes, n. 88; Buller's N. P. 283-4; The King v. Boston, 4 East, 582; Bent v. Baker, 3 Term R. 27. His only interest consisted in the effect of a verdict for plaintiff, on the claim case. Stone v. Stone, use Underwood, 1 Ala. R. 582; Bettis, adm'r, v. Taylor, 8 Porter, 564, 578; Boren et al. v. McGehee, 6 Porter, 432; Perkins and Elliott v. Mayfield, 5 ib. 182; Collingsworth v. Horn, 4 S. & P. 227; Hooper v. Pair, 3 Porter, 401.

J. W. Pryor, contra.

The only question in this case, is, did Gilbert fraudulently conceal the property specified, on the 22d October, 1842, the time he made his application to the bankrupt court? No fact would be competent evidence on the trial, unless it tends to prove, or disprove, the fraudulent concealment.

1. The declarations of Gilbert, to Shannon, were made about six months before the application of Gilbert, and could not therefore explain any thing that took place, at the time he made his said application. That Gilbert had money six months before his said application was made, which belonged to Simmons, is wholly immaterial upon the trial of this cause.

2. The declarations of Simmons, made in 1842, in presence of Gilbert, are incompetent evidence. It does not appear, whether the wood was hauled before, or after, said 22d October, 1842, nor whether the declaration of Simmons was made before, or after, said day. Suppose they were made before said day, would they have any tendency to disprove

the fraudulent concealment, &c? Certainly not. The fact that Gilbert was hauling wood on "account of Simmons," before the said day, could not tend to prove, or disprove, the fraudulent concealment of the property specified, on said day. But if the declarations were made after that day, they would be equally incompetent, as not tending to prove, or disprove, the fraudulent concealment. But what does the declaration, that Gilbert was hauling wood *on account* of Simmons, mean? Does it mean, that he was hauling as the servant, or agent, of Simmons? that he was hauling with the dray and team and negro, belonging to Simmons? that Simmons had hired Gilbert to haul the wood with the team and negro of Simmons? What does it mean? No one can tell. Now, it must be borne in mind, that Gilbert could readily have proved the ownership of the negro and team in Simmons, if they really belonged to Simmons.

3. The declarations of Lemuel W. Gilbert, at the time he hired the slave to Shelby, were properly admitted. Lemuel W. Gilbert had possession of the negroes at the time he hired them—the declarations accompanied the act of hiring, and were therefore part of the *res gestæ*. Edward W. Gilbert, in pursuance of the declaration of L. W. Gilbert, collected part of the hire.

4. The declaration of Gilbert, that he had made eighty bales of cotton in Louisiana, with six poor hands, was properly admitted. The question was, did Gilbert conceal money and property on 22d October, 1842? The record shows, that he was not engaged in any lucrative business until he removed from Alabama, in the spring of 1847. Then, the question, where did he get the six hands, with which he made the cotton, became very material. The amount of cotton was wholly immaterial, and could not affect the case. The declaration was admissible, as showing that Gilbert had six hands. It was for him to show where he got them, after the plaintiff proved that he had not been engaged in any business by which he could have made money. He had a family to support. How did Gilbert acquire the $800 which he loaned to Simmons in 1843, the year after his application to the bankrupt court? He was engaged in no business by which he could have made money, and this is shown by the

record. It was the same money which he was charged by the plaintiff with having concealed, 22d October, 1842. But this declaration was admissible on two grounds: 1. As showing that he had negroes in his possession, which he could not have got by any business he had been engaged in. 2. If the six negroes with which he made the cotton, can be supposed to be part of those he got from Simmons's estate, instead of the land for the $800 due by Simmons, then this would tend to prove that Simmons owed the $800 on the 22d October, 1842, as Gilbert could not have made the money in 1843, by any business he was engaged in, and he does not show how he got it, &c.

COLLIER, C. J.—1. We have repeatedly held, in conformity with the generally received doctrine, that the declarations of a party in the possession of real or personal property, that he held it in his own right, or under another, is proper evidence as a part of the *res gestæ*, which *res gestæ* is his possession, but such declarations beyond this, are no part of the *subject matter*, or *thing done*, and cannot be received as evidence, upon the hypothesis that they are. The citations by the plaintiff in error, establish this proposition.

The answer of plaintiff, when applied to by Shannon to borrow money, that he had no money of his own, but had some belonging to Simmons, for wood sold for the latter, which he had no doubt that Shannon could get, if Simmons did not want it, perhaps does not appear to have been made simultaneously with the payment of money to the latter. Simmons was not present when the conversation took place, but "drove up immediately after" it had terminated, when the plaintiff handed him "a roll of money, probably about $100." Whether Shannon remained with the plaintiff until Simmons's appearance, or the subject of the conversation had not been dismissed, does not distinctly appear; but if necessary, it should perhaps be intended in favor of the decision of the circuit court, that it was not continuous, and a part of the act by which the plaintiff handed the money. Be this, however, as it may, the declarations are not admissible to the extent to which they go, viz: to show that the plaintiff had no money but what belonged to Simmons. The payment

to the latter, of a sum supposed to be $100, was the *res gestæ*, and declarations as a part of this, which was the *thing done*, are proper evidence to explain it. But the declarations which were offered, went beyond the *res gestæ*, and tended to show, not only that the payment of the $100 was *bona fide*, but that the plaintiff had no more money. Thus, we see, that that which it is insisted was a part of the transaction, is greater than the whole, and the citations to which we have referred, clearly establish that it was properly rejected.

It certainly cannot be inferred, from any thing in the record, that the declarations were against the interest of the plaintiff, so as to legalize their admission upon that ground. We will further add, that we cannot very well perceive, from the case as presented, how the rejected testimony could explicate the question of fraud in obtaining the certificate of bankruptcy—the proceeding upon which it is founded not being instituted until six months after the conversation referred to.

2. The remark of Simmons, in the presence of the plaintiff, that the latter was hauling wood on his account, were rightly rejected at the trial. It does not constitute a part of the fact of hauling, but it asserts something independent of it, viz: that the dray and team employed, or the wood hauled, were Simmons's, and that the plaintiff was in his service. In McBride and wife, et al. v. Thompson, 8 Ala. Rep. 650, we said, "while it is allowable to prove statements of one in possession, and explanatory thereof, it is not permissible to show every thing that may have been said by him in respect to the title; as that it was acquired *bona fide*, and for a valuable consideration; was paid for with the money of a third person, or his own," &c. Here, it does not appear that Simmons was in possession of the dray and team, although he may have been the proprietor of the land from which the wood was cut, yet there was no *res gestæ* with which his declarations can be legitimately connected, or to which they are properly referable. They go quite beyond the business in which the plaintiff was engaged, and tend only to establish Simmons's right to the profits which resulted from it.

True, we have often held, that where a party states a fact in the presence of another, which the latter is interested to

dispute, if he is silent, his assent to the statement may be inferred. But, in the present case, there is nothing to warrant the presumption, that the plaintiff's interest was opposed to the assertion of Simmons, even if the affirmation of Simmons, could, by implication, be made the declaration of the plaintiff. Conceding, however, that such is its effect, and still, it may be asked, if the plaintiff could make evidence for him, by declaring that he was in another person's employment? To maintain such to be law, would require the admissibility of declarations, as connected with the *res gestæ*, to be carried beyond all precedent, that has come under our observation.

3. A witness, offered at the instance of the defendant, testified, that in 1845, he hired of Lemuel Gilbert two slaves, the latter representing himself as the agent of the plaintiff—the witness subsequently paid a "portion" of the hire for these slaves to the plaintiff, who received it *as hire;* another portion he paid to a third person, but in what character it was received by such person, does not appear. The question arising upon these facts, is, whether the declarations of L. G., as to the character in which he hired the slaves, were admissible. It is an established rule, that the fact of agency must first be shown, before the declarations of the supposed agent can be received as evidence. Strawbridge v. Spann, 8 Ala. Rep. 820; Scarborough v. Reynolds, 12 Ala. R. 252. For this purpose, the admissions of the principal are evidence, or the agency may be proved by the agent as a witness. 2 Phil. Ev. C. & H.'s Notes, 188, 189. These citations are quite sufficient to show, that the declarations of Lemuel Gilbert were inadmissible to prove he was the agent of the plaintiff. Yet, if L. G. was in possession of the slaves at the time he hired them to Shannon, his declaration that they were the property of another person, was admissible as a part of the *res gestæ*, to show that he did not claim them as his own. McBride and wife, et al. v. Thompson, 8 Ala. Rep. 650, is an authority directly to the point. That he was in possession at the time, must be intended in favor of the judgment of the circuit court, as the bill of exceptions does not negative the fact, and it appears that Shannon received the slaves under his contract. If the plaintiff supposed the jury would regard the declaration as establishing the fact of agen-

cy, he should have prayed the court specially to instruct them, that it could not have that effect, and to point out the purpose for which it was admitted. No exception was taken to the testimony, tending to show a subsequent ratification of the hiring by the plaintiff, and if there had been, we should incline to think, that it was entirely competent.

4. In Hargroves v. Cloud, 8 Ala. Rep. 173, we said, the possession of property by a bankrupt, at the time of his discharge, or immediately after, which by industry he might reasonably have acquired, does not warrant the presumption, that he did not make a full surrender of his estate; but if the value of the property is so great, as to make it improbable that it was earned since the filing of the petition in bankruptcy, it devolves upon the bankrupt to show how he became the proprietor of such property, when his discharge is impugned for fraudulent or wilful concealment. Under the authority of the principle of this decision, it was clearly competent for the defendant to have inquired into the extent of the plaintiff's planting interest in Louisiana, even four years after he obtained his certificate, that the jury might determine, from all the facts, as to his sources of income, whether that interest has not been acquired, or increased by the intentional concealment of his estate from the court that ajudged him a bankrupt. The testimony upon this point was properly received.

5. It appears, that slaves, supposed to be the property of the plaintiff, had been levied on under the execution, which it was the object of the present proceeding to quash; that these slaves were claimed by Mrs. Simmons, as executrix of her deceased husband, which claim was still pending, and undetermined. A son of the testator, and *a joint legatee of his whole estate, with others*, of which no final distribution had been made, was offered as a witness for the plaintiff. Young Simmons was clearly an incompetent witness—his interest extended beyond the question litigated, and was an interest in the result of the controversy, in respect to which he was required to testify. If the execution was quashed, then it would become inoperative, and the levy, which rested upon the continuance of its efficacy, would fall with it; the plaintiff in execution, on whom the *onus* lies of proving the liabil-

ity of the property levied on as against the claimant, would fail to prove the first, and indispensable fact, viz., that there was an operative execution to support the levy; consequently, the claimant would succeed. Blount and Stanley v. Traylor, 4 Ala. Rep. 667. This view is sufficient, to show the interest of the witness in the plaintiff's success, and he was therefore properly rejected. The result is, that the judgment of the circuit court must be affirmed.

GRAY v. GRAY.

1. In a bill for divorce, an averment of the marriage, of the residence of complainant in this state for three years, next preceding its exhibition, and of the abandonment of the husband, for the space of three years, without the intention of returning, is sufficient. The readiness and willingness of complainant, at all times during the abandonment, to receive and live with her husband, need not be averred.
2. A wife is not entitled to a divorce from her husband, on the ground of abandonment for three years, without the intention of returning, where, by her conduct, she has driven him from her society, and has continuously denied him the *locus penitentiae*, and privilege of returning. In such a case her consent to the separation must be intended.
3. Declarations made by the husband, of his intention not to live with his wife, can not operate as an estoppel, in a suit for a divorce, instituted against him by the wife, on the ground of abandonment.
4. Where a wife refuses to accept the provision, made for her support, by the husband, but elects her own place of residence, in contravention of his wishes, she can not complain, that he does not provide for her.
5. As a general rule, in chancery proceedings, the costs may be taxed upon either party, at the discretion of the court, but it must be a legal discretion, exercised in accordance with general rules, and former precedents.
6. Under our statutes, the reason of the English rule, that the wife is a privileged suitor, as to costs, does not apply, and a court of chancery may, as in other cases, tax the *prochein ami* of the wife, with the costs of a suit instituted by her, for a divorce from her husband.

Error to the Chancery Court of Lowndes. Before the Hon. Joseph W. Lesesne, Chancellor.

THE facts of this case are sufficiently stated in the opinion of the court.

JUDGE, WATTS & JACKSON, for plaintiff in error.

1. Though this is a civil case, yet the facts are criminal, and the consequences of the decree, serious and final; therefore, the strictest proof should be required. Evans v. Evans, 4 Eccl. Rep. 313, 342.

2. To entitle the wife to a divorce, the abandonment must be without fault on her part. Taylor v. Taylor, 6 Eccl. R. 81; Warring v. Warring, 1 ib. 210; Best v. Best, 2 ib. 163. These cases were for divorce, on the ground of cruelty; but the same principle must apply in the case at bar. See also 2 Kent, latest ed. p. 128; Hill v. Hill, 6 Law Rep. 174.

3. When the abandonment is by mutual and persevering consent, (although this would be ground of divorce according to the civil law: see Sto. Confl. L. 169,) no divorce will be granted to either. See 11 Ala. 628; Jones v. Jones, 13 Ala. 145; 4 Eccl. Rep. 298, 349.

4. If the evidence shows an abandonment on the part of the husband, still the wife cannot obtain a divorce, because the proof shows that she was as much to blame in the separation as he was. This is evidenced by her avoiding him on all occasions; by refusing to take the school provided for her at Terry's; by instituting the suits at Wetumpka chancery court; and in unnecessarily running him in debt. She has no right to complain of a separation which she was active in perpetuating, if not in procuring. See Whittington v. Whittington, 2 Dev. & Bat. 64. She showed her willingness to a separation, and her anxiety for it, by instituting the suits for cruelty, to make the separation perpetual. Did the legislature ever intend to give any person a remedy for that to which he and she, either directly or indirectly, expressly or impliedly, assent? See Jones v. Jones, 13 Ala. *supra*.

5. She should have held herself ready, during the space of three years, to return to the matrimonial bed whenever the husband sought it. See Hill v. Hill, 6 Law Rep. *supra*.

6. The cruelty charged in the bill, and abandoned at the hearing of the cause, cannot aid the charge of abandonment. See Pidge v. Pidge, 3 Metc. 257.

7. As to the confessions of parties, see Clay's Dig. 171, § 16; Richardson v. Richardson, 4 Porter, 476; 11 Ala. 628; 4 Eccl. Rep. 546; Story's Eq. Pl. § 263, and 265, a. The Alabama statute excludes them in all cases, not merely where there is collusion, as some of the cases cited by the defendant's counsel, show to be the case of other states. The object of the statute was to prevent the court from being imposed on by the collusive acts or declarations of the parties; and in order to do this effectually, it provides, that in no case shall the confession of either party be taken or received as evidence, in any case of divorce.

Boling and Stone, contra.

1. All the allegations of the bill are substantially proved by the testimony.

2. Defendant left complainant in March, or April, of 1842, at the house of Lewis C. Gaines, in Dallas. Complainant received no assistance there from defendant, except money due him there, to get to her friends in Autauga, and this without his consent. She never received any assistance from him afterwards.

3. The conduct of defendant, when complainant followed him to Vernon, shows he left her at the house of Gaines, with intention of abandonment.

4. The records in the first suit are not evidence here. Adams v. McMillan, 7 Por. 73.

5. The answer of defendant is no evidence for him. Moyler v. Moyler, 11 Ala. 620.

6. The declarations of defendant, at the time his wife returned to him, or followed him to Vernon, are evidence as part of the *res gestæ*. 11 Ala. R. *supra*. Also his declarations at Mrs. Price's. Dillon v. Dillon, 3 Curtis's Eccl. Rep. 397; 7 Eccl. Rep. 397; 2 Littell, 337; 4 How. (Miss.) Rep. 112; 11 Pick. 461; 1 Johns. Ch. R. 198.

7. Neither the complainant, or next friend, is liable for costs, no matter how the case goes. Richardson v. Richardson, 4 Por. 478.

8. The complainant acted upon the declarations of her husband, in declaring he did not intend to live with her, or do any thing for her. Not until then did she file her bill. He is bound by these declarations. 1 Greenleaf's Ev. § 27, 207, 209.

9. The decisions in the N. Hampshire Reps. are founded upon a statute, which requires the abandonment to be without sufficient cause. The language of the Kentucky statute is similar to ours.

CHILTON, J.—The defendant in error, filed her bill in the chancery court of Lowndes county, for a divorce from her husband, Joshua Gray, alleging cruel treatment, as also, that he had abandoned her, without the intention of returning, for the space of three years, next before the filing of the bill.

Upon the trial in the court below, the complainant abandoned the ground of cruelty, and relied solely upon the alleged abandonment, for relief.

It is insisted in this court, by the counsel for the plaintiff in error, that the allegations of the bill are insufficient, in as much as there is no averment that the complainant, during the period of abandonment, was at all times, ready and willing to live with and receive her husband. The case to which we have been referred by the counsel, of Richardson v. Richardson, 4 Port. Rep. 476, does not sustain this position; and we are clearly of opinion, that the allegation of the abandonment, is sufficiently set forth, and that if the wife rejected efforts for reconciliation, and refused to receive the husband, or to live with him, this may be shewn by him as matter of defence, but it is not indispensible as an averment of the bill, that she should show such willingness. It is sufficient for the bill to aver the marriage,—that the complainant has resided in this state three years next before its exhibition, and that the husband has left her for the space of three years, without the intention of returning. This, the bill in this case does, and although many superfluous allegations are superadded, they do not vitiate, but at most, would be regarded as surplusage.

The framers of our constitution, seemed to be fully sensible of the great importance, of preserving indissoluble, as far

as practicable this, the most sacred of all the domestic relations. Hence, they declared, as a part of the fundamental law of the state, "that divorces from the bonds of matrimony, shall not be granted but in cases provided for by law, by suit in chancery: and no decree shall have effect, until the same shall be sanctioned by two thirds of both houses of the general assembly." Our legislature, influenced by the same wise policy, in respect to divorces, have, in the language of the learned judge, in Moyler v. Moyler, (11 Ala. Rrp. 622) "accumulated expressions as if for the purpose of hedging it around with difficulties."

It is to be feared, from the frequency of divorces, that this policy, conceived in the profoundest wisdom, has not at all times been carried out. This, doubtless results, not from want of respect for the law, but from the imperceptible influence, which feelings of sympathy, and humanity, exert over the mind, begetting a desire to have those separated, who, themselves, so ardently desire to be separated, and whose union promises nothing of harmony or happiness. "We need not," says an elegent writer on the subject, "be afraid of drawing the marriage, knot, which chiefly subsists by friendship, the closest possible. The amity between the persons where it is solid and sincere, will rather gain by it; and where it is wavering and uncertain, this is the best expedient for fixing it. How many frivolous quarrels and disgusts are there, which people of common prudence endeavor to forget, when they lie under the necessity of passing their lives together, but would soon be inflamed into the most deadly hatred, were they pursued to the utmost under the prospect of an easy separation." (See Shelford on Mar. and Div. 307.)

In the decree before us, the chancellor has taken a very correct general view of the subject; but we have examined and analized the testimony upon which the decree is predicated, and are constrained to pronounce, that it does not authorize a sentence of perpetual separation between the parties, and of celibacy on the part of the husband. It would subserve no good purpose to extract, and embody in this opinion, the testimony of the numerous witnesses, who have been examined on both sides of this controversy, and thus publish to the world the history of their petty difficulties,

and indiscretions. We need only say, that we are fully satisfied from the proof, that both parties are in the wrong: that while the conduct and conversation of the husband, have exhibited a want of that manly forbearance, delicacy and tenderness, which should characterize the deportment of his sex, towards "the weaker vessel;" the wife has not left him without apology, in her want of conformity to his wishes, her peevish, fretful disposition, and occasional use of epithets calculated to wound his feelings, and render her society unpleasant to him. We do not think that when he left her in Dallas county, and went to seek another situation for teaching school, that he entertained the idea of deserting her. It was not until she refused to accept the situation he had procured for her in the family of Mr. Terry, that he was provoked to declare his intention not to live with her any longer. It is however, clear, from her conduct, both then and subsequently, that she readily acquiesced in his determination, and that she was perhaps, more determined than he, upon the separation; for such was her aversion to him, that at her request he was forbidden to visit the house at which she was boarding, and upon one occasion, was actually ordered off the premises, by the proprietor. True, the witness swears it was not at her request; but that she had previously expressed her desire that he should not be allowed to visit the house. Upon another occasion, it seems they had mutually agreed to enter into articles of separation, and were dissuaded by a mutual friend from consummating such arrangement. These facts, connected with the other circumstances in proof, showing her strong disinclination to have any interview with him, and the several efforts she has made since the separation, and before the expiration of three years, to obtain a divorce, followed also, by an indignant repetition of a proposition for reconciliation, before the exhibition of this, which is the third bill she has filed for divorce, since their differences commenced: all satisfy the mind, that the separation was not only agreeable to her feelings, but that she has contributed to its continuance by all the means in her power. If a husband leave the wife, without the intention of returning, to entitle her to a divorce, she must not, by her conduct, have driven him from her society, and have continuously denied him the *locus*

penitentiae, and privilige of returning; for in that event, we must intend the separation was by her consent, in which case, she is not entitled to a divorce. Jones v. Jones, 13 Ala. Rep. 145.

Lord Stowell in his learned decree, in Evans v. Evans, 1 Hagg. Cons. Rep. 36, 37, has well remarked, "If two persons have pledged themselves at the altar of God, to spend their lives together, for purposes that reach much beyond themselves, it is a doctrine to which the morality of the law gives no countenance, that they may by private contract, dissolve the bonds of this solemn tie, and throw themselves upon society in the undefined and dangerous characters, of a wife without a husband, and a husband without a wife."

Although in the case before us, there is no special agreement between the parties to live seperate from each other, yet the conclusion deducible from the whole proof is irresistible, that such separation was mutual. That while the husband declared more than once that he would not live with his wife, she at the same time gave indubitable proof that he should not do so. Under such circumstances to give their separation the sanction of law, by granting a divorce, would be to afford a preceden twhich would tend greatly to weaken the bond, of matrimonial cohabitation, much of the hapiness of which depends upon its indissolubility.

The doctrine of estoppel, as applicable to the declarations of the husband, insisted upon by the counsel for the defendant in error, has no application to cases of this character. The husband could not by the sworn admissions in his answer entitle the wife to divorce, much less could his admissions not under oath, and out of the record, have that effect. The object of the rule is to prevent collusion between the parties, and to this end the statute expressly provides, that "in no case shall the confession of them, or either of them be taken or received as evidence in any case of divorce."

It may not be improper, in conclusion to remark, that the parties in this case appear to be educated, respected, and intelligent. They have an infant daughter, the object of their mutual attachment and solicitude, and the husband swears in his answer that he has a strong attachment for his wife. In view of these facts it seems to us that the affection they have

for their offspring, who must otherwise share their mifortune, the respect due to public decorum, and a high sense of moral duty as well as a proper regard for their own comfort and peace, should induce them to forget the past, and in a spirit of reciprocal forgiveness and conciliation, to live together as husband and wife. We see no reason why they may not do this, and render easy the yoke, which the law, under the circumstances of this case, does not allow them to cast off.

In respect to the husbands failure to support the wife, after she went to Vernon, upon which some stress has been laid, we have only to say, the proof shows he was poor; that she was unwilling to keep house on account of her delicate health, and being unwilling to undergo the drudgery incident to housekeeping. That he had made arrangments for her living at Mr. Terry's, and to provide her a nurse; but contrary to his wishes, she declined to reside there, and went to reside with another family, one of the members of which he esteemed inimical to him. She cannot, then, complain that he did not provide for her, when she exhibited no disposition to accept the provision which he made, and elected in contravention of his wishes, her own place of residence. Besides, she has had a proceeding in chancery, continuously in progress against him for divorce, since April 1843, and she could readily have obtained alimony, if she had brought herself within the provisions of the law, by an application to the chancery court, in which she was proceeding. See Richardson v. Richardson, 4 Por. Rep. 479.

As to the matter of cost, we have felt some hesitation. The statute declares, "That costs in cnancery shall be paid by either party, at the discretion of the court"—Digest 350 § 26. This statute but affirms a general principle, which obtained as the law, before its passage. But although the court has a discretion with respect to costs, it is not to be understood that it should give or withhold costs at pleasure, but may, it is said, exercise a legal discretion, in accordance with general rules and former precedents. Goodall v. Whitmore, 2 Hagg. Eccl. Rep. 374; Shelford on Div. 531. It is laid down by the author last cited, page 533, that in suits instituted either by the husband or the wife, the wife is a privilged suitor, as to costs and alimony. The reason which

lies at the foundation of this doctrine, is, that the wife is presumed to have no separate property; but by the marriage, it is supposed the whole property vests in the husband. Hence it is laid down as a general rule, "that the husband must pay the cost incurred by the wife in suits for divorce." Shelford, 533. And the cost, it is said, may be taxed, *de die in diem*, so that the wife may not be put to inconvenience or delay, in prosecuting her suit. So also, when she is required to live separate from her husband, the court will grant alimony, *pendente lite*. Such was the decision of this court, in Richardson v. Richardson, supra, and we think it accords with the practice of the ecclesiastical courts of England. Shelford 534, and authorities there cited. But by the act of 1841, "No *feme covert* shall file a bill for divorce, or other matter, otherwise than by her next friend, except in cases where her husband has joined with her in the bill." The obvious design was, to have some one responsible for the costs, and although under the law as it is above laid down, no decree for cost, can be rendered against the wife (except in cases where she has a seperate estate.) We think under this statute, and the general discretion of the court over the subject of costs, we have the rightto make a just and equitable distribution of it between the husband and *prochein ami*. And as the former, by his indiscreet, conduct and hasty declarations, afforded plausible ground for filing the bill, he was rightfully taxed with the cost in the court below. The decree then, so far as it respects the costs, is affirmed; but the same as to the divorce which was decreed, is reversed, and the bill must be dismissed. The *prochein ami* must pay the cost of this court, as he has forced the plaintiff here to rid himself of the decree.

We have no power in the present posture of the case to make any order respecting the custody of the child, nor would we be disposed to exercise it if we had. We indulge the hope that she may yet be favored with the joint guidance, and protection, of father and mother.

Decree as above stated.

ALLEN AND WATKINS v. THE STATE BANK.

1. The vote of a majority of *all* the legal voters of a township, is necessary to authorize the rescission of a contract for the sale of 16th section land. The assent of a majority of the voters, is not sufficient.

Error to the Circuit Court of Wilcox. Before the Hon. Geo. W. Stone.

J. T. Johnson, for plaintiff in error.

The court below erred in the charge given, and in refusing to give the charge asked for. Pam. Acts, '45-6, p. 49. This act provides, that "a majority of the voters of the township in which such 16th section lies, voting in township meeting, &c., shall have full power to rescind or cancel the contract of sale," &c. If due notice of the township meeting was given, and in pursuance of such notice, *a majority* of the voters of the township attended such meeting, and a majority of those in attendance voted to rescind the contract of sale, it was, according to the provisions of the act, a rescission of the sale. Because a majority of the voters of the township having agreed to go into an election, did thereby consent that the judgment of a majority of their number, should be the judgment of the whole.

C. Sellers, contra.

DARGAN, J.—This suit is brought on four notes, given for the purchase of sixteenth section lands. The defence was, that the contract of sale had been rescinded, under the authority of the act of the 4th of February, 1846, by a vote of the township, at a township meeting, held for that purpose, with the consent of the purchaser.

The evidence shows, that there were fifty-six or seven qualified voters in the township, but only thirty-five votes were given: of these, eighteen were in favor of a rescission of the contract, and seventeen opposed to it. The defendants requested the court to charge the jury, that if they believed, that a majority of the voters of the township were

present at the election, and a majority of those present voted in favor of a rescission of the contract, the plaintiff could not recover. This request the court refused to give, and instructed the jury, that they must find for the plaintiff, unless they believed, that a majority of all the legal voters of the township, voted in favor of rescinding the contract.

The act prescribes, that in all cases, where a sale has been made of a sixteenth section, or any part thereof, a majority of the voters of the township, in which such sixteenth section lies, voting in township meeting, upon due notice given, shall have full power, with the consent of the purchaser, or purchasers, their heirs, or assigns, or legal representatives, to rescind, or cancel the contract of sale. We think it very clear, that it was the intention of the legislature, that a majority of all the legal voters of the township, should concur in rescinding the contract of sale, before it could be done. The language of the act is, that a majority of the voters of the township, voting in township meeting, shall have power, with the assent of the purchaser, to rescind the contract. This language does not authorize a bare majority, of a majority of the voters, to rescind a contract of sale: but the concurrence of a majority of all the votes is necessary, before the purchaser can claim that the contract is rescinded. See Sims v. Br. Bank, 6 Ala. 496.

Let the judgment be affirmed.

SORRELL v. CRAIG, Adm'r.

1. A credit indorsed on a note by the plaintiff, which is beneficial to him, and prejudicial to the defendant, is not of itself admissible evidence for the former, and should be excluded from the jury.
2. A plea of *ne unques executor*, is a plea in bar, not in abatement, and puts the plaintiff on proof of his representative character, without being verified by affidavit.
3. Is it not too late, after a cause is before the jury, on issues joined, to re-

lieve the plaintiff from the proof of facts, which he has voluntarily assumed the burden of proving?—*quere.*

Error to the Circuit Court of Wilcox. Before the Hon. N. Cook.

THIS was an action of assumpsit, on several promissory notes, instituted against defendant, originally in the name of the executors of John Sorrell, and afterwards revived in the name of plaintiff in error, as administrator, &c. A number of pleas were filed by the defendant, upon which issue was taken, and among them the plea of *ne unques executor.* The suit was commenced in 1842, and the notes sued on, all matured 1839, '40, and '41. The defendant offered in evidence on the trial, and read, in opposition to the objection of plaintiff in error, which the court overruled, the following indorsement on one of the notes: "July 15, 1841. Received of the within, two hundred and ninety-eight dollars. John Sorrell," the hand-writing of John Sorrell being first proved, and in connection, the deposition of a witness, who testified, that in July, 1841, John Sorrell went to Texas, where, in a few months, he died, and that about the 15th July, 1841, just before he left for Texas, the witness was present at a settlement between him and plaintiff in error, at which time the latter paid the former some $700, and took up a note for that amount, which had been given for money loaned. The witness did not see, at that time, either of the notes sued on. The settlement occupied about three hours, and during it, papers passed between the parties, but the notes sued on were not taken up, nor settled at that time, nor did plaintiff in error pretend that he had settled them.

There was no proof, that the plaintiff below, or his predecessors, were the legally constituted personal representatives of John Sorrell, deceased.

The defendant below requested the court to charge the jury, that the plaintiff could not recover in this action, unless the evidence showed, that the original plaintiffs were executors, as described in the declaration, or that the present plaintiff was administrator as alleged, which charge the court refused to give, but charged the jury, that the defendant could

only avail himself of the want of such proof, under a plea in abatement, and that having omitted so to plead, it was a waiver of any proof as to this point, and an admission of the plaintiff's representative character.

To the refusal to charge as asked, and to the charge given, the defendant excepted, and now assigns them as error.

G. R. Evans, for plaintiff in error.

1. The indorsement on the note, in the hand-writing of plaintiff's alleged testator, was inadmissible as evidence to charge the defendant below. Walker and Stone v. Wyckoff and Ferguson, 14 Ala. 560.

2. The plea of *ne unques executor*, is a good plea in bar, and there being no *profert* of letters in the declaration, the plaintiff was bound to prove his representative character. The ruling of the court, that the objection can be taken only by plea in abatement, cannot be sustained. Stallings v. Williams, adm'r, 6 Ala. 509; Worthington, adm'r, v. McRoberts and Porter, 7 Ala. 814.

COLLIER, C. J.—1. In Walker and Stone v. Wyckoff and Ferguson, 14 Ala. Rep. 560, it was decided, that a credit entered on a note, in the hand-writing of the payee, is not evidence, in the absence of further proof of payment, so as to relieve the note from the influence of the statute of limitations. This decision rests upon the principle, that the admission of the indorsement of the credit, would be to permit the payee to make evidence for himself. The same reason applies, where the receipt is beneficial to the party making it, and prejudicial to him against whom it is offered in evidence, though it may not arrest the operation of the statute of limitations. If such were its probable effect, in the present case, it should have been excluded from the jury, or if, from the circumstances under which it was offered, it was *prima facie* admissible, and its incompetency was afterwards developed, it should have been withdrawn, or the jury instructed to disregard it. We cannot very well determine, from the facts stated in the bill of exceptions, that probable injury has resulted to the defendant from the admission of the credit indorsed on one of the notes, but will not assume the reverse;

it is, indeed, unnecessary to consider the point further, than to declare the law, as we have already done, so as to prevent error upon a future trial, as the cause must be reversed, for the second error assigned.

2. The present action, was brought by the executors of John Sorrell, deceased, and after the pleadings were made up, James D. Craig, was substituted as the plaintiff, in their stead. Among other pleas, the defendant pleaded *ne unques executor*, on which issue was taken, and submitted to the jury. The circuit judge was mistaken, in supposing that the representative character of the plaintiff, could only be denied by plea in abatement; but if the law were otherwise, was it not too late, after the cause was before the jury, upon issues which the parties themselves had made up, to relieve the plaintiff from the proof of the facts, which he had voluntarily taken upon himself the burden of proving? We will not stop to answer this inquiry; for as the plea of *ne unques executor*, does not propose to give to the plaintiff a better writ, but denies his right to sue at all in the representative character he has assumed, it is regarded not only a plea in bar, but a meritorious defence. Stallings v. Williams's adm'r, 6 Ala. Rep. 509; Worthington, adm'r, v. McRoberts and Porter, 7 Ala. Rep. 814.

It results, from what we have said, that the judgment of the circuit court must be reversed, and the cause remanded.

McKEEN & BRO. v. HARWOOD.

1. H. desiring to rent a store for the year, obtains from B. & S., the respective owners of two, the refusal of them, at the priees fixed upon each, viz: B's at $1,500, and S's at $1,200; McK. & Bro. desiring also to rent one of the same stores, apply to B. & S. respectively, for that purpose, each of whom informs them of his promise to H., and declines renting to them: McK. & Bro. then call upon H., who consents to waive, in their favor, the privilege accorded to bim by S., on the condition, that they will pay him, $150, it being one half the difference between the prices of the two

stores, to which they agree: H. thereupon rents, and occupies for the year, the store of B., and McK. & Bro. rent, and occupy for the same term, the store of S.: *Held*, that the contract of McK. & Bro. is founded on a sufficient consideration to support an action thereon, instituted against them, by H.

Error to the Circuit Court of Mobile. Before the Hon. John Bragg.

This was an action of trespass on the case, instituted by defendant, against plaintiffs in error. By the bill of exceptions, found in the record, it appears, that Harwood applied to Sidney Smith, and John Bloodgood, to rent from them stores, respectively owned by them, and obtained from each the refusal of his store, at the price placed upon it, that is, Smith's, at $1,200, and Bloodgood's, at $1,500. McKeen & Bro. also applied to Smith and Bloodgood, for the purpose of renting, and were informed by each, that Harwood had the refusal of his store. Harwood did not bind himself to take the store of either Smith or Bloodgood. Harwood took the store of Bloodgood, and McKeen & Bro. promised him, that if he would let them take the store of Smith, the rents should be equalized between them, that is to say, that McKeen & Bro. would pay Harwood $150, it being one half the difference between the rents of the respective stores of Bloodgood and Smith. Harwood agreed to this, and each party occupied the store respectively rented by them, and paid the rent therefor. Bloodgood's store was the most valuable. Neither Bloodgood nor Smith looked to any one else, than the occupant of his store, for the rent.

The counsel of defendants requested the court to charge the jury, that if they believed the evidence, the promise of defendants was without consideration, and void; which the court refused, but charged the jury, that if the plaintiff had the refusal of the store of Smith, and waived that right in consideration of the promise of defendants, the plaintiff could recover. To the refusal to give the charge asked, and to the charge given, the defendants excepted, and now assign them as error.

Lockwood, for plaintiffs in error.

The agreement, or promise, made by Smith, giving Harwood the refusal to rent the store for $1,200 per annum, was void. There was no mutuality in the agreement. See Bennett v. Bisco, 4 Johns. R. 234; Cooper v. Oakley, 3 Term R. 653, 148; Utica R. R. Co. v. Brinkerhoff, 21 Wend. 139.

The giving the refusal to rent, was a matter of pure courtesy on the part of Smith, and exclusively personal to Harwood; hence, the refusal could not be transferred, or relinquished, by Harwood, to a third party.

The promise, or agreement, giving the refusal to rent the store by Smith to Harwood, being void, and exclusively personal, the promise by the McKeens to pay Harwood money, for the transfer, or relinquishment of said refusal, is void. There is not even a past consideration. Eble v. Judson, 26 Wend. 97.

A moral, or conscientious obligation, unconnected with any prior legal or equitable claim, is not enough to support a promise. See 3 Bos. & Pull. 249, note; Smith v. Ware, 13 Johns. 257; 16 Johns. 283, note.

An express promise is of no binding validity, when there is nothing in the original engagement, which the law regards as a legal consideration. 21 American Jurist, 276, 278.

Hamilton, contra.

On the record, after verdict, it is to be taken, that Harwood had acquired the refusal of the stores by a valid contract. No writing was necessary: a lease for a term not longer than a year is valid, without a writing. See Clay's Dig. 505-6. Any damage or injury to the promisee, or advantage to the promissor, is a sufficient consideration. 1 Caine's R. 45; 3 Johns. R. 100; 1 Litt. R. 123; 2 Peters, 182; 8 Mass. 162, 200; 6 ib. 58; 6 Pick. 427, 432; 2 Bibb, 30. Nor is it necessary, the consideration should exist at the time of making the promise, if it arise afterwards, in consequence of the promise, it is sufficient. Train v. Gold, 5 Pick. 384; Gardiner v. Webb, 17 ib. 407; Hilton v. Southwick, 17 Maine, 303. In this case, Harwood surrendered the right, or what is the same thing, the opportunity he had, of taking the store for $1200, and assumed the payment of a higher rent of $1500,

in consequence of the promise by the McKeens. Here was a damage to Harwood of $300.

The McKeens were also seeking to rent a store, and applied to the owners of both these stores. Had Harwood taken the store of Smith at $1200, for aught that appears, they would have had to take the store at $1500. This was obviated by their agreement with Harwood. Here was a benefit to the McKeens of at least the $150 agreed to be paid, if not of $300, the difference between the rents. The McKeens so considered it, or they would not have made the contract with Harwood.

The case of Price v. Seaman, 2 Bing. R. 437, s. c. in error, 4 Barn. & Cress. 525, in principle meets this case exactly. It was there held, that a transfer of a contract to purchase real estate, was a sufficient consideration, to support a promise to pay money; and that a court of error could not say there was no consideration, although the contract of purchase, may have been void, by reason of being by parol only, the defendant having enjoyed the benefit of his bargain. So in this case. The defendant enjoyed the benefit of his agreement with Harwood, and now seeks to repudiate that agreement.

The court will observe, that both Smith and Bloodgood, when applied to by McKeen, subsequently to the arrangement between themselves and Harwood, with regard to the renting of their respective buildings, considered themselves bound by their contract with Harwood, and declined making any contract with McKeen, because of their previous agreement with Harwood.

Harwood, then, had obtained an advantage under his agreement with these gentlemen, (to wit, that of securing the store at the smallest rent,) which he waived under his agreement with McKeen, the benefit of which they got, and in consideration of which, they made their promise to him.

It may very well happen, that Harwood may not have been bound to take the store for the whole year, after having obtained the refusal of it, and yet, have made a valid contract, by which he had the right, within a limited time, of taking the store, or of intimating his refusal. This court

will make all proper presumptions, if it be necessary, to support the verdict below.

This action is well brought. 1 Wheat. 237; 7 Ala. 753; 2 Stew. 472; 3 Watts & Serg. 329; 4 Porter, 435, 502; 1 Wright (Ohio) 373.

The case in 4 Johns. R. 234, does not reach this case.

CHILTON, J.—It is perfectly clear, in this case, that had Harwood sued either Bloodgood, or Smith, for a refusal, on their part, to comply with the promise which they had respectively made, to him, to give him the refusal of renting the stores owned by them, at the prices stipulated, he could not have recovered; for the promise was not only without any consideration, but wanted another essential element of a valid agreement—mutuality. And this is the gist of the decision, upon which the plaintiff in error mainly relies, in the case of Burnett v. Bisco, 4 Johns Rep. 234. In that case, there was a written promise to give the plaintiff the refusal of a farm for the term of two years, for a stipulated amount, which was to be guaranteed by good security. The plaintiff averred that he had complied, on his part, and had tendered the security, and that the defendant had refused to comply, &c. Held, that the action was not maintainable, as there was no agreement on the part of the plaintiff to take the farm, and that as nothing of value passed from him, and there was no promise on his part, to support the promise on the part of the defendant, the contract was *nudum pactum*. But it is most obvious, that the case at bar, is wholly without the influence of the principle settled by that case. Here, the parties who made the promise, to give the defendant in error the refusal of renting their stores, at the prices respectively stipulated, fully recognize their honorary obligations, in their willingness to comply with the promise they had made him. So long then, as Smith and Bloodgood chose to recognise his right to elect to rent either of the stores, McKeen and Brother, could make no lease. Thus the promise to Harwood operated to the prejudice of McKeen & Bro., to the extent of the injury which resulted from their present inability to lease. At the same time, the exclusive privilege for the time, being voluntarily awarded to Harwood, by Smith and Bloodgood, was a

benefit to him; for it enabled him to take at his election the better bargain—not an election, the right to which, the law would have enforced, but which the proprietors of the stores were willing to accord him.

Thus viewing the condition of the parties, let us see what change the contract declared on, wrought upon their situation. After McKeen & Bro. made the agreement to take the house of Smith at $1200, and to pay Harwood $150, who was to take the store of Bloodgood at $1500, it is very clear that Harwood could not legally have rented Smith's store, to the exclusion of the plaintiffs in error; for by the terms of the contract, in consideration of the mutual promise of McKeen & Bro. to pay him $150, he was bound not to do it. But Harwood was not only denied the election to take the house of Smith, but the plaintiffs in error were thereby enabled to conclude the contract for the house, which before that time, by reason of the promise to Harwood, they had been unable to make. There was then, in legal contemplation, not only a detriment to the promisee, but a benefit to the promisor.

It is no answer to say, that Smith was not bound to let McKeen & Bro. have the premises, at the rate at which Harwood was to have them, but could have refused altogether. The parties at the time of the contract knew of his right to reject both of them, and must be presumed to have contracted with reference to it. But Smith did not refuse to conclude the lease, and this furnishes the best evidence to show that McKeen & Bro. knew he would not. At all events, it does not lie with the plaintiffs in error to say, in the absence of all fraud, imposition or injury, we ought to be relieved from a compliance with our contract, since we *might* have been thwarted in our expectations, but we were not.

We feel satisfied, that according to the well settled rules of law, the consideration was sufficient to support the promise, and that the court below properly refused to instruct the jury to the contrary. The law is not particular in ascertaining how much of benefit to the one, or detriment to the other, of the parties, resulted from the contract, as the mere inadequacy of consideration will not render it invalid. It has been held, that a promise to pay, if a party would swear to the truth of his demand, is binding, as supported by a consid-

eration, if the party make the affidavit accordingly. 18 Johns. Rep. 337. Any damage, suspension, or forbearance of a right; any benefit to the party promising, or prejudice, detriment, or trouble to the party to whom the promise is made, has been generally esteemed a sufficient consideration. See cases in the brief of defendants counsel—also, Jones v. Ashburnham, 4 East, 455; Lent v. Padelford, 10 Mass. 236; Seaman v. Seaman, 12 Wend. 381; Gillespie v. Battle, at the present term.

It is said, however, that the contract is void, as being against public policy. We are unable to see what principle of public policy is violated by it, and the counsel has not pressed the argument upon this point. It is not usual to speculate upon the courtesies gratuitously extended by friends, but there may be cases where the strictest morality will not forbid it. At most, this is a question between Smith and Harwood, and in which the plaintiffs in error have no concern. They have received all they contracted for, and should be held to a compliance with the contract.

Let the judgment be affirmed.

TANNER ET AL. v. WHITE.

1. If husband and wife be sued on a note given by the wife *dum sola*, the marriage must be averred, or the declaration is bad, either on demurrer, or on error.

Error to the County Court of Pickens. Before the Hon. Lemuel A. Gilkey.

This was an action of assumpsit, brought by defendant, against plaintiffs in error, to recover of them the sum due on a promissory note, made by E. A. Reid. The declaration alleges, that Elizabeth Tanner, one of the plaintiffs in error, whilst she was unmarried, made the note, and that she did

not, whilst unmarried, pay said note, nor have either of the defendants paid it, since their intermarriage. The defendants failed to appear, and judgment was rendered against them by default. The declaration contains no averment of the marriage of E. A. Reid with James H. Tanner.

The judgment of the court is now assigned as error.

Peck and Porter, for plaintiffs in error.

1. The declaration contains no joint cause of action against the plaintiffs in error. It describes a note made by Elizabeth Tanner, without stating any liability whatever by the plaintiff, James H. Tanner.

2. The declaration contains no cause of action whatever against the plaintiff, James H. Tanner. It does not state that he is the maker of the note declared on, or that he is in any way bound for its payment; and the judgment is by default, without any appearance, by either of the plaintiffs in error.

3. The court will not presume the parties to be man and wife; and if so, no cause of action is set out against Tanner. But suppose a presumption arises that they were *baron* and *feme*, the presumption also arises that they were so, at the time of the promise by her; and if so, a promise set out as by the wife is bad, as she can make none. 2 Bac. Ab. Bar. and Feme, L. 62; Morris v. Norris, 1 Taunt. 212; Edwards v. Davis, 16 Johns. 281; Jackson v. Vanderheyden, 17 ib. 167; Nutz v. Rentter, 1 Watts, 229. A recovery against a *feme covert*, may be avoided by the husband on writ of error. 2 Bac. Ab. Bar. and F. L. 61, note; Candell v. Shaw, 4 Term R. 361.

DARGAN, J.—The case of Strickland v. Burns, decided at the last term of this court, shows, that the declaration in this case is bad. It was there held, that if husband and wife be sued on a note given by wife *dum sola*, the marriage must be averred, and under the general issue, must be proved. Indeed, the rule is too plain to admit of doubt, that a declaration, which does not show the liability of a defendant, is bad, either on demurrer, or on error.

Let the judgment be reversed, and the cause remanded.

CROTHERS v. ROSS'S DISTRIBUTEES.

1. A writ of error will *not* lie to revise the action of an orphans' court, in refusing to set aside and vacate a decree, rendered at a previous term.
2. It is not permissible for a court to vacate a judgment or decree, rendered by it, at a previous term, unless authorized to do so by legislative enactment, or by a practice so often sanctioned, as to establish it.

Error to the Orphans' Court of Mobile. Before the Hon. John A. Cuthbert, Judge.

In this case, a petition was filed by plaintiff in error, who was the administrator of Jack F. Ross's estate, for a *supersedeas*, to stay proceedings on an execution, issued in favor of the distributees, on a decree, rendered upon final settlement. The *supersedeas* was awarded, and at the September term, 1847, of the orphans' court of Mobile, the plaintiff in error moved the court, to set aside and vacate, on the grounds set out in the petition, the decree rendered at the previous August term.

The court dismissed the petition and *supersedeas*, and this action of the court is now assigned as error.

K. B. Sewall, for plaintiff in error.

1. The rule, that the court has no control over its judgments, after the adjournment of the term at which they were rendered, for any purpose whatever, applies alone to common law courts, and to terms thereof, which are prescribed by law, and of which all parties are bound to take notice. Our statutes are silent upon the subject: we are therefore governed by the Westminster statute, and the English practice; and there, in the common law courts, a new trial may be applied for at any time within the first four days of the next term after judgment rendered; and in some cases, applications will be granted after the four days have expired. Price v. Dugger, 40 Eng. Com. Law R. 554.

2. The county court, for orphans' business, has stated terms, which are the same as its terms for common law busi-

ness—twice a year; and also return days, or sittings in vacation, (Clay's Dig. 303, § 31, 34, 35; ib. 298, § 13, 23, 24; ib. 301, § 24,) at which the judge may dispose of such matters, "as he is competent to hear in vacation." They are not terms, but merely sittings in vacation, upon an appointed day, and that in the discretion of the judge, provided it be once each month. Executions are improperly made returnable to these return days, which shows they are not terms of court. Graham et al. v. Chandler, 12 Ala. 829. If the practice of the common law courts of England be applied to the orphans' court, its decrees rendered in vacation, or at a return day, which is the same thing, would be subject to modification at the instance of any party, at the next stated term.

3. The proceedings, and practice, in the orphans' court, are not according to the rules of the common law courts, but according to the course of practice in the ecclesiastical courts, or the civil law courts, except so far as they are prescribed, or modified, by statute. Watson and wife v. May, 8 Ala. 180, 181; 2 Chit. Gen. Prac. 481, et seq.

4. Crothers is a creditor, as well as the administrator, of the estate of Ross: he has been injured by the decree rendered, and has a right to complain to the court which rendered it, and ask redress, according to the course of proceedings and practice of such courts. The record shows he was absent when the decree was rendered, and the court cannot therefore deem him constructively present, from the fact that he is the administrator. As a creditor, he certainly has as much right to redress as any other creditor: his claim has been rejected by the court; and he comes and propounds his interest, and gives notice to those in adverse interest, and asks for the proper decree. If Crothers were simply a creditor, and not administrator, this would be the proper course. Watson and wife v. May, 8 Ala. 181. The court will not place him in a worse position than other creditors of such estate.

5. If the particular prayer of the petition was improper, the court would give the appropriate relief under the general prayer, if the facts of the application authorized it: and the facts were not contested, but proved to the satisfaction of the

court; but the relief was denied, not on the merits, but on the mere ground, that the application was too late.

W. G. Jones, contra.

COLLIER, C. J.—The plaintiff, by his petition, prayed the orphans' court to annul, or modify, its decree, rendered at a previous "return day," or "stated session," of that court, by which his accounts as administrator, were finally settled, and the estate of the intestate distributed, upon special allegations, that great injustice had been done by that settlement. Conceding that it was competent for the court to have entertained the petition after the decree was perfected, the court adjourned and execution issued, and it by no means follows, that its dismissal, even if it was established by proof, is revisable on error. "The granting, or refusing, a new trial, is a matter within the discretion of the court trying the cause; and however decided, cannot be revised on appeal or writ of error. Nor can the refusal to decide upon such a motion, be thus made the ground of objection to a judgment, in other respects regular; for as the appellate court cannot examine into its merits, and determine whether it should have been granted, it cannot undertake to say, that the party complaining has been prejudiced by refusing to decide upon his application for a new trial." In the latter case, "a *mandamus* is the appropriate remedy to compel the judge to make such a decision, as in his judgment is proper and legal." Bridges and Beers v. Miller, 3 Ala. Rep. 746.

But in this case, the petition came too late, and when the orphans' court could not grant its prayer. "It is not permissible for a court to avoid its judgment or decree, after the expiration of the term at which it was rendered, unless it be in conformity to some legislative provision, or a practice so often recognized as to establish it. We are aware of no statute which confers such a power upon the orphans' court, and as that court does not proceed according to the course of chancery, it cannot exercise a modifying, or annulling power over its *final* decrees, by any proceeding analogous to a bill of review." Slatter and wife v. Glover, adm'r, 14 Ala. Rep. 648. The practice in the courts sitting at Westminster, in

entertaining rules for new trials, furnish no analogy to guide us. These courts are influenced by the control they exercise over trials at *nisi prius*, and by rules peculiar to themselves. Consequently, the citation of the plaintiff's counsel, from 2 Man. & Grang. Rep. 641, is altogether inapplicable. The decision of the orphans' court, we have seen, cannot be revised, and the writ of error is therefore dismissed.

POWELL v. WASHINGTON & BROCK.

1. A petition for a *supersedeas* of an execution is regarded, under our practice, in the nature of a statement, or declaration of facts, and when demurred to, if the demurrer is overruled, and the respondent declines to answer over, the court may take the facts as admitted, and render judgment thereon.
2. Where a suit is instituted by one, having the beneficial interest in a note, in the name of the payee, who is dead, for the use of the former, and the defendant appears, and suffers a judgment *nil dicit* to be rendered against him, he is estopped from afterwards moving to vacate the judgment on account of the death of the nominal plaintiff: and a security of the defendant in such a case, is as much concluded by the judgment as the defendant himself.
3. That a party employed counsel to conduct the defence of his case, who was compelled by family affliction, to leave the court before the cause was reached, is not a ground upon which a judgment can be vacated in a court of law, after the term at which it was rendered.

Error to the Circuit Court of Cherokee. The record does not show before whom tried.

On the 24th of March 1841, a suit commenced in the name of Powell, for the use of John Morgan, against Warner Washington, one of the defendants in error, in a justice's court, to recover of him the sum of thirty five dollars, due by note, on which a judgment was rendered against said Washington. In 1844, a petition filed, and *certiorari* awarded to remove

said cause to the circuit court of Cherokee, and the defendant Brock, became the security of Washington, on his *supersedeas* bond. At the Oct. term 1845, the defendant appeared, and judgment *nil dicit* was rendered in the circuit court, against Washington and Brock, and on the 3d day of March, 1846, Brock filed his petition for a *supersedeas*, to stop proceedings on the execution on said judgment, on the grounds therein set out, which was granted and *supersedeas* issued accordingly. The petition is based on the following facts, as grounds of relief: That Powell was dead before the commencement of the suit in the justices' court, and that Washington had employed counsel to defend the suit in the circuit court, but that his counsel, owing to family affliction, was compelled to leave the court before the cause was reached, on the docket. At Oct. term, 1847, the attorney of Morgan, the beneficial plaintiff in the judgment, demurred to the petition, which demurrer was overruled, and said Morgan declining to answer over, the court ordered and adjudged "that the *supersedeas* be made perpetual," &c.

This is now assigned as error.

A. J. Walker, for plaintiff in error.

The court should not, upon overrulingt he demurrer, have given judgment, until the death of the plaintiff, before the commencement of the suit, was proved. Cravnes & Justice, v. Bryant, 3 Ala. Rep. 278; Sherrer v. Boyd, 10 ib. 279; Zurcher v. Magee, 2 ib. 253; Walker v. Bank of Alabama, 4 Stew. & Por. 715; Bates v. P. & M. Bank, 8 Por. 98.

The beneficial plaintiff is living; it is he who is authorized to receive the money, and the judgment is really in his favor. All the reasons why judgment in favor of deceased parties should be set aside, are inapplicable to this case, and although the court would abate a suit, because the plaintiff was dead before the commencement of the suit, yet it will not vacate it for that reason, after the judgment has been rendered.

Even though the court below was authorized to vacate the judgment, it should have been upon a writ of error *coram vobis*, and not upon a motion for a *supersedeas*.

S. F. Rice, contra.

1. A surety in a *certiorari* bond is not prejudiced by the omission of his principal, on the trial of the cause, to interpose the objection of the death of plaintiff before suit brought. Babcock v. Williams, 9 Ala. Rep. 150.

2. But that omission is sufficiently excused by the facts averred.

3. The death of the plaintiff before suit brought, is a bar to a recovery. Jenks v. Edwards, 6 Ala. Rep. 143.

4. A judgment in favor of a plaintiff, who was dead before the suit was brought, is a nullity, and ought to be vacated or set aside, on motion. And a *supersedeas* is a motion to that effect. Hood and Stennett v. Bank at Mobile, 9 Ala. Rep. 335.

5. When nominal plaintiff is dead before suit in his name, the fact that there is a usee, makes no difference; because at law, it matters not how much equity there is, the legal plaintiff must show a legal right, which a dead man cannot have. Westmoreland v. Davis, 1 Ala. R. 299.

6. Where parties appear, and will not take issue after demurrer overruled, the court may enter judgment by default, as upon admission of the facts alleged. If the defendant in a *supersedeas* desired the allegations of the petition to be proved, he should have so stated in the court below. Spence v. Walker, 7 Ala. R. 568.

CHILTON, J.—It has been the practice, under our statute, authorizing a *supersedeas* of executions, to consider the petition in the nature of a declaration, or allegation of facts, upon which the plaintiff predicated his claim for relief. Hence, it may be demurred to, and if the demurrer is overruled, and the defendant refuse to take issue, the court may very properly consider the allegations as admitted, and render judgment. Shearer v. Boyd, 10 Ala. Rep. 281; Spence and Stennett v. Walker, 7 Ala. Rep. 568.

In this case, the demurrer of the defendant to the petition, was overruled, and he refused to plead over. The court entered judgment against him on the allegations of the petition.

The only question is, do the facts alleged in the petition, authorize the judgment. The ground upon which the party

seeks relief in this cause, is, that Powell, the nominal plaintiff, was dead before the action brought. The judgment was by *nil dicit*, and the motion is now made, after the execution issued to vacate it.

Anciently, the objection could only have been taken by plea in abatement. The modern practice, however, allows the matter of the plaintiff's death, before the action brought, to be pleaded also in bar. See Jenks v. Edwards, use, &c. 6 Ala. R. 144. In this case, however, neither mode of defence was resorted to. The defendant, Washington, appeared, but made no defence. Is it permissible for the security of Washington on the *supersedeas* bond, to say there was a valid defence, of which my principal might, but did not avail himself? If such defence was of a meritorious or equitable character, we will not say the security against whom the judgment has been summarily rendered, might not have relief in equity, but no such question is here involved. The defence goes merely to the capacity of one of the parties to sue. That capacity was admitted, by failing to object to it on the trial. A different conclusion would lead, in many cases, to the most ruinous consequences to parties plaintiff.

This case furnishes an example of what, in many cases, would occur. The suit was commenced in March, 1841, before a justice of the peace, and prosecuted to judgment. No objection made as to the death of the nominal plaintiff. The case is taken to the circuit court, and there another judgment was rendered, the defendant not gainsaying it. In October, 1847, when the note on which the action is founded, has been barred by the statute of limitations, and when, perhaps, the original debtor has become insolvent, the court is asked to vacate, and amend the judgment, and turn the party out of court, burdened with the accumulation of costs. Such proceeding is not sanctioned by precedent, and certainly has no foundation in reason or justice.

We are referred to Hood et al. v. Bank at Mobile, 9 Ala. Rep. 335, where it is said, a judgment rendered *against* a dead man, is a nullity. In such case, the representatives of the party deceased, may move to set it aside. They are not estopped, not being party or privy to the proceeding. The cases are distinguishable. Here, the defendant admits by his

default, that the plaintiff is in life, and the beneficial owner of the note, upon that admission, proceeds to judgment. The defendant must be held to the admission, which his failure to plead creates. And the security is as much concluded by the judgment at law, from setting up the defence, as Washington, his principal.

That the plaintiff employed counsel to defend him, and whose family was taken sick, so as to call him from the court, can have no influence on the cause *at law*. Such excuses are heard in equity, where the party shows a meritorious defence, of which he has been deprived, without any fault or negligence on his part.

But it is said, no *legal right* was shown in Powell. The defendant did not make an issue requiring it to be shown; and we cannot tolerate that he shall make an issue now, which he should have made some six years before, when the suit was first tried, but did not.

Let the judgment be reversed, and the cause remanded.

HART v. SMITH.

1. A bill of exchange, payable *at sight*, is entitled to days of grace, and a demand of payment, and notice to the drawer, without a previous presentation for acceptance, are insufficient to charge him.

Error to the County Court of Lowndes. Before the Hon. Edward H. Cook, Judge.

The facts of this case are fully shown in the opinion of the court.

Stone, for plaintiff in error.

T. J. Judge, contra.

1. Bills payable at sight, being different from those payable on demand, (9th ed. Chit. 410,) should be presented for ac-

ceptance within a reasonable time, and before payment thereof be demanded. Chitty on Bills, 10th ed. 274; Fernandez v. Lewis, 1 McCord, 322. For, (sight meaning acceptance,) bills payable at, or after sight, do not become due until after they are accepted, or protested for non-acceptance. Brown v. Turner, 11 Ala. 752; Chitty on Bills, 10th ed. 272; Stephens's N. P. 875, and authorities there cited. And, after acceptance, it is now well settled, that such bills are entitled to days of grace. 9th ed. Chitty on Bills, mar. pp. 409, 410; 10th ed. Chit. on Bills, marg. pp. 376, 377, and note T, on p. 377; Bailey on Bills, 5th ed. 98; Forbes on Bills, 142; Janson v. Thomas, B. R. Trinity Term, 24th Geo. 3; Dixon v. Nuttall, 1 C. M. & R. 307; Dehers v. Harriot, 1 Show. 163; Coleman v. Sayer, 1 Barnard, 303; Viner's Ab. title Bills Ex.; 3 Dougl. 421; Selwyn's N. P. 9th ed. 351. In the case at bar, then, the presentment for payment was premature, and a nullity. 1 Mason, 176; Wiffen v. Roberts, 1 Espinass. 262; Brown v. Harraden, 4 Term R. 148; Griffin v. Goff, 12 Johns. 423; Savings Bank v. Bates, 8 Con. 505; Pratt v. Eads, 1 Blackford, 87. The authorities cited by plaintiff in error, showing it unnecessary to protest an inland bill, to authorize a holder to recover, have no application: there is a difference, between protest and notice.

DARGAN, J.—This was an action of assumpsit, on a bill of exchange, drawn by the defendant, in favor of the plaintiff, on Desha & Smith, dated the 26th February, 1846, payable at sight. The only evidence introduced to charge the drawer, was the bill, and protest, showing a demand of payment made of the drawees, on the 4th of March, 1846, and notice to the drawer. The court charged the jury, that the plaintiff could not recover.

A bill, payable on demand, or at any fixed time, need not be presented for acceptance, but a demand of payment, at the time the holder has the legal right to demand payment, is all that is necessary. And if the bill be not paid, the holder may protest it for non-payment, and on his giving due notice to the drawer and indorsers, their liability is fixed. Evans v. Bridges, 4 Porter, 345; 1 Peters, 25; 2 ib. 170; Chitty on Bills, 10th ed. 272. But when the time of payment is

uncertain, and a presentation of the bill is necessary, in order to ascertain, and fix, the time of payment. As, if the bill be payable at a number of days after sight, then the bill must be presented for acceptance before payment is demanded. Story on Bills, § 112, 227; Chitty on Bills, 10th ed. 272; Bayley on Bills, 5th ed. 217, 218.

It is contended, that a bill payable at sight, is entitled to days of grace, and therefore it must be presented for acceptance, before payment can be demanded.

I am free to confess, that my opinion, untrammeled by authority, would incline me to hold, that a bill of exchange, *payable at sight*, is not entitled to days of grace, and that payment may be demanded on presenting the bill; which, if refused, would authorize the holder forthwith to have it protested for non-payment, and, on giving notice to the drawer, to hold him liable. But the law seems to be settled otherwise. Judge Story, in his treatise on Bills, says, "that days of grace are allowed on all bills, whether payable at a certain time after date, after sight, or even at sight. And although there has been some diversity of opinion, whether bills payable at sight, are entitled to days of grace, it is now settled by the decisions, both in England and America, that days of grace are allowable on such bills." § 342, p. 429. To the same effect, see Chitty on Bills, 10th ed. 376; Bayley on Bills, 5th ed. 244, 245; Selwyn's N. P. 9th ed. 351; Coleman v. Sayre, 1 Barnard, 303; Dehers v. Harriot, 1 Show. 165; Stephens's N. P. 876. Under the influence of these authorities, I feel constrained to hold, that a bill payable at sight, is entitled to days of grace; consequently, a demand of payment made of the drawer, upon the first presentation of the bill to him, is insufficient to charge the drawer, for the bill is not then due. As there was no evidence of any previous presentation of the bill for acceptance, nor notice given of non-acceptance, the demand of payment was prematurely made, and was therefore a nullity.

As the evidence fails to show a demand of payment on the day the bill was payable, the court correctly instructed the jury, that the plaintiff could not recover.

Let the judgment be affirmed.

FRY v. MERCHANTS' INSURANCE COMPANY.

1. The complainant should not be delayed in proceeding to foreclose a mortgage, because there is a controversy among the defendants about the surplus, after satisfying the mortgage.
2. When compensation is made in money, in *lieu* of an assignment of dower, the decree should not be for a gross sum, but for the payment annually, of the sum ascertained to be the annual value, of the dower interest.
3. When a woman marries, after the execution of a mortgage, by her husband, on land, a court of chancery, whilst it makes the security available to the mortgagee will take care that the interest of the widow is not affected, more than is necessary to secure the payment of the debt.
4. Upon a bill to foreclose a mortgage, where there are infant defendants, it is error to decree a sale of the property, without a reference to the master to ascertain, how much of the property it was necessary to sell, to satisfy the mortgage.
5. In the mode of offering the property for sale, the interest of all the defendants should be consulted.

Error to the Chancery Court at Mobile. Before the Hon. Anderson Crenshaw.

The bill in this case was filed by defendant, against the plaintiffs in error, and alleges, that on the 1st of April, 1835, Wm. W. & G. H Fry, executed and delivered to Peter A. Remson and Miguel D. Eslava, their deed of mortgage whereby they conveyed to them, certain real estate in the city of Mobile, particularly described in the mortgage, which is made an exhibit to the bill, to secure a debt of forty two thousand three hundred and fifty dollars, due on their five several promissory notes, payable on the 1st April 1836, and on the 1st day of April of each successive year up to 1840 inclusive : that on the 13th May, 1835, the said mortgagees assigned said mortgage and notes to one Sheffield, who afterwards on the 13th Jan. 1843, assigned them to the complainant : that fifteen thousand dollars still remain due and unpaid on said notes: that Wm. W. Fry has departed this life, and that he left a widow, Martha E. Fry, and an only child, Wm. W. Fry, an infant under the age of twenty one years : that the widow

claims the right to redeem her dower interest, and James Stewart and William L. Thompson, of Kentucky, and the branch of the bank of the state of Alabama at Mobile, claims the right to redeem the mortgaged estate, by reason of some conveyance executed by said William W. and George H. Fry, but that none of the parties asserting an interest in the estate, or a right to redeem, will pay the plaintiff the balance due on said mortgage. The prayer of the bill is, that the several parties above named, be made defendants, and for a foreclosure and sale, &c.

The defendant, Thompson, answered the bill, and set up a conveyance from George H. Fry, for one half of the property, subsequent to the date of complainant's mortgage, to his co-defendant, Stewart, and a mortgage from Stewart to him, to secure a debt of about $8000 to $9000.

The branch bank answers, and claims title to a portion of the mortgaged estate, under a judgment rendered against William W. Fry and others, in the county court of Mobile, on the 25th June 1839, a levy and sale under it, and the sheriff's deed.

The answer of Martha E. Fry, insists on her right of dower, and if it be chargeable with the mortgaged debt, that an account be taken, and she be allowed to redeem her dower interest.

On the first Monday in Dec. 1845, a receiver was appointed by the chancellor, and on the 2d Monday in Dec. 1846, an order of reference was made to the master, to ascertain and report:

1. The sum due to complainant on the debt secured by the mortgage.

2. The sum due on the claims of the defendants, and the order of priority.

3. The claim of dower of Mrs. Fry, and how far it is affected by the mortgages, and the manner in which it should be protected.

4. The manner in which the property should be sold, and the best mode of selling the same for the interest of defendants.

5. The amount of money in the hands of the receiver, and the mode of its application.

The master reported, as due to the complainant, $10,000, with interest from 1st January 1845, and that complainant held the first lien: that the defendants, Thompson and Stewart, hold a lien on the undivided interest of Geo. H Fry, and the branch bank the equity of redemption of the undivided estate of William W. Fry: that Mrs. Fry's right of dower, attaches after the payment of complainant's debt; that the property should be sold clear of dower, and she be allowed one fourth of the proceeds of the sale after the payment of complainant's debt: that the property should be sold in separate tenements: and that the sum received from the receiver should be appropriated to the extinguishment of complainant's debt.

Mrs. Fry, and the infant defendant, by guardian, excepted to the report; their exceptions were overruled by the register, and they appealed therefrom, to the chancellor, who also overruled them, confirmed the master's report, and rendered a final decree in accordance therewith.

The errors now assigned by Martha E. Fry, are,

1. Because her right of dower was not decreed to be sold separately.

2. That her interest was blended with those of the other parties.

3. The confirmation of the master's report as to the mode of sale.

4. The decree of sale.

J. A. Campbell, for plaintiff in error.

1. The court is bound to ascertain the best mode in which the estates of infants shall be sold. If the inferior court neglects this duty, or performs it negligently, it is error. 1 Ala. Rep. 379, 391.

2. The priorities between defendants should be settled in the decree; and if erroneously settled, the court will reverse it. A cross bill is only required when there is a contradiction between the parties in regard to their rights. In this case, there is no opposition as to right—no conflict in fact. The simple question is, (no one objecting,) can the defendant ask for such an adjustment as will separate his estate for sale. 10 Paige, 49.

3. The widow has a right to redeem her separate estate. 10 Paige, 49; 14 Pick. 98; 12 Ala. 112.

4. The answer of Mrs. Fry, insists upon a separation of her dower estate, and for leave to redeem it. The court should have allowed it. These questions were all presented in the court below, and no objection can be taken for any *laches*.

Lockwood, contra.

The decree simply states, that the complainant has established its right to the relief sought. The master, in his report, states, that the complainant has the prior lien out of the whole fund; that the widow has the interest therein specified in the moiety of the balance, and that the bank claims the balance of the same moiety. The decree also directs the master to bring the whole fund into court, to be applied according to its directions. This was the proper course, when there are conflicting claims of defendants, which cannot well be adjusted in a bill filed to foreclose a mortgage. When a fund is in court, arising from a surplus fund in a mortgage suit, it is matter of discretion with the court, to direct a bill to be filed to ascertain the rights of conflicting claimants, or to settle their rights on reference to a master. Sweet v. Jacobs, 6 Paige, 365. The fund in which the defendant, W. W. Fry, claims an interest, is open to future investigation and decision. The complainant should not be delayed in proceeding to foreclose a mortgage on account of the conflicting interests of the defendants; but the decree should order the fund to be brought into court, subject to its future disposition. Cullum et al. v. Erwin, adm'r, 4 Ala. 452.

The mortgage was executed by the deceased husband of Mrs. Fry, long anterior to her intermarriage with him. She is therefore only entitled to dower in the surplus, which surplus cannot be ascertained, except by a sale of the premises. The isolated sale of her dower interest, in property consisting of different parcels, claimed by others having undivided interests, would, for the reasons before stated, bring much less, than if the separate parcels were severally sold in entirety. The wife is endowed of the surplus, after paying the mort-

gage debt. Titus v. Nelson, 5 Johns. Ch. 452; Hawly v. Bradford, 9 Paige, 201.

The peculiar connection of the interest of Mrs. Fry, with that of the other parties, in distinct parcels of undivided property, fixes the necessity of a sale of her interest with that of the others, it being for the mutual benefit of all.

The mode of sale, as reported by the master, and allowed by the court, was the best for the interest of all parties, and not prejudicial to that of the widow.

The proceedings, as disclosed by the record, authorize the decree of sale.

COLLIER, C. J.—It may be premised, that if a conflict of interest should exist among the defendants as to the disposition of the fund arising under the mortgage, of which the complainant is the assignee, beyond what is necessary to discharge it, the complainant should not be delayed in proceeding to a foreclosure and sale of the mortgaged premises, as its rights can be in no manner affected by a controversy, which merely concerns the defendants *inter se se.* Cullum et al. v. Erwin, 4 Ala. Rep. 453.

It is certainly true, that a court of chancery should guard the interests of infants, who are brought before it, and see that no decree, not in conformity to strict law, shall be made, which injuriously affects their rights. Where the object of a suit is to foreclose a mortgage, to which such persons are defendants, an inquiry should be made, not only, whether a sale of the whole, or only of a part, and what part of the premises will be most beneficial, but it is said the plaintiff must also prove his debt, before the master, in the same manner as if nothing had been admitted by the answer; and the master must report such proof, and also the computed amount of the principal and interest due; and of what, and which part of the premises, (if any short of the whole,) a sale would be sufficient to raise the debt; and at the same time, be most beneficial to the infant. Mills v. Dennis, 3 Johns. Ch. Rep. 367; Brinckerhoff v. Thalimer, 2 Johns. Ch. Rep. 486; Ontario Bank v. Strong, 2 Paige's Rep. 301; Walker et al. v. Hallett, 1 Ala. Rep. 379. The order of reference, and report of the master, made professedly in pursuance of it, are defec-

tive in several of the particulars, which we have stated are essential to the regularity of the proceedings.

In respect to the dower interest of Mrs. Fry, neither the bill, nor her answer, alleges that she was, or was not, married to her deceased husband at the time the mortgage was executed, and the register does not show, by any proof accompanying his *last report*, which was the only one received and acted on by the chancellor, when their marriage took place. The report, however, affirms, that the interest of the deceased husband, "after the satisfaction of the complainant's debt, is subject to the dower of Mrs. Fry; that the property should be sold clear of dower, and that her interest should be protected by allowing her one-fourth of the proceeds of said sale, after the payment of the complainant's debt." We infer from this statement, that the register was satisfied by proof, that the deceased mortgagor was not married to his surviving wife, at the time the mortgage was executed. His conclusion, that the wife should be allowed one-fourth of the remaining interest of her husband, after the complainant's debt was paid, cannotbe supported as a legal proposition. In Beavers v. Smith, 11 Ala. Rep. 20, it was held, that when compensation is made in money, the decree should not be for a gross sum, by estimating the supposed present value of the widow's life estate, but for the payment annually, of the sum ascertained to be the annual value of the dower interest, during the life of the dowress, secured by a lien upon the estate. See also Johnson v. Elliott, 12 Ala. Rep. 112.

In Bell v. The Mayor of New York, 10 Page's Rep. 49, the widow was the actor by bill in chancery, to be endowed of an equity of redemption. The chancellor said, "where the heir has the right to redeem, and the wife is entitled to dower in the equity of redemption, she has the equitable right to redeem her dower, as against the mortgagee, and those claiming under him, upon the payment of such portion of the encumbrance as is equitable and just. Van Dyne v. Thayer, 19 Wend. Rep. 162. Where that equitable right is actually vested in her, by the death of her husband in possession of the premises, as in this case, I can discover no principle of law or equity, which authorises the mortgagee to deprive her of it, except by the institution of such proceed-

ings against her, to foreclose the equity of redemption, as are by law, required to bar the equity of redemption of the heirs at law, in the same premises." It must, however, be observed, that there is a statute is New York which, either in terms, or by an equitable construction, authorises a life estate in lands to be valued and compensated in money. Such, at least, is inferable from the case cited. But it is said further, "In the ordinary case, of a life estate in the equity of redemption, existing in one person, and the remainder in fee belonging to another, if the mortgagee has foreclosed the equity of redemption of the remainder-man, but has through inadvertence, neglected to make the owner of the life estate a party to the foreclosure, the latter cannot claim possession of the premises, during the continuance of his life estate, upon paying the interest on the amount due upon the mortgage, from year to year, for life. But the court should, in such case, direct the master to fix a gross sum, upon the principles of which, the present value of a life annuity is calculated, considering the annual interest on the amount then due on the mortgage, as the annuity. And the proportion of the mortgage money of the owner of the life estate, being thus ascertained, he should be permitted to redeem his interest in the mortgaged premises, by the payment of that amount; and then to be let into the possession during the continuance of his particular estate in the premises. Or the decree might direct his life estate to be sold, for the purpose of satisfying his proportion of the debt thus ascertained, and that the surplus arising from such sale should be paid to him." We have quoted thus largely from the case cited, though we cannot recognize it, at least, in some of its positions, as an authority to guide us, without overruling our decisions, and perhaps, arrogating, to some extent, the power of legislation.

If Mrs. Fry is not entitled to dower, as against the complainant, the complainant is entitled to have all, or so much (as may be necessary) of the mortgaged premises sold, as may be required, after appropriating the nett amount of rents, since the premises have been placed in the hands of the receiver, to pay the debt sought to be recovered, with interest. The dowress has never, by any direct proceeding, asked an assignment of dower, and if she were, it would only be allowed her, if at all,

subject to the complainant's rights, if they are paramount to her claim. In the present posture of the case, and upon the hypothesis that she was not married, until after the execution of the mortgage, all that a court of chancery could do, would be while it made the complainant's security available, to affect in as small a degree as is consistent with this paramount object, her subordinate interest.

We have not stopped to scan, with particularity, the exceptions to the register's report, though we have seen that it is obviously defective, in respect to the lien of the infant mortgagee. Nor will we inquire, whether the chancellor should not *mero motu* have set it aside, as an insufficient basis for his final action. Whatever our conclusions might be, upon these questions, we are satisfied that the decree itself, is erroneous, in ordering a sale of the entire mortgaged premises, though they consisted of three several tenements, which he directed to be sold separately. The decree certainly should not have adjudged all the property to be sold, if a part is sufficient to pay the debt. An application of the rents, as we have iudicated, should first be made, and then, only so much, and such part of the property (having a due regard to the interest of the widow and heir,) as will extinguish the mortgage. To enable him to act understandingly in the matter, there should be a special reference to the register, and a report by him.

The priority of the subsequent incumbrances, is not a question which the assignment of errors presents, and perhaps, it will more appropriately arise upon the register's report, subsequent to the sale under the decree of foreclosure. We therefore, decline its consideration.

It was not incumbent upon the register, to have adopted the proposition of the guardian of the infant heir. The mode of sale it proposed, might, and would probably, have operated prejudicially to the defendant, who claims under George H. Fry, in subordination to the complainant, as well as to the branch of the bank of the state of Alabama, at Mobile. In protecting the widow and heir, it is not allowable to disregard the interests of their co-defendants.

This view is sufficiently indicative of onr opinion, upon several of the questions, suggested by the record, and if at-

tentively observed, may serve as a guide in the ulterior proceedings, at least, so far as it respects the complainant's rights, as against the defendants. We have but to add, that the decree is reversed and the cause remanded, that another reference may be ordered, &c.

DARGAN, J. not sitting.

SHIELDS v. BYRD.

1. To enable a party to revive a judgment of the court, by which he was compelled to submit to a *non suit*, it is not necessary it should appear in the judgment entry, that the *non suit* was taken in consequence of the judgment of the court, on a matter of law arising in the cause. It is sufficient, if the matter appears in a bill of exceptions.
2. When the notice sent up with the writ of error, is dated the day previous to the suing out of the writ of error, this court will intend that it is a clerical misprision, and will consider the writ of error amended.
3. A plea pleaded by its name, without consent to receive it in that form, is bad on demurrer.
4. When a defendant when applied to for a deed, denies having it in his possession, and expresses his belief that it is in the register's office, where an ineffectual search is made for it, and also in the office of a lawyer, who once had it in possession, a sufficient predicate is laid for proof of the deed, by a certified copy, and no notice to the party to produce the deed, is necessary.

Error to the County Court of Dallas. Before the Hon. A. J. Saffold, Judge.

THIS was an action of assumpsit, on the common and money counts, by plaintiff, as trustee of Clementina M. Walke, against the defendant in error. The record recites that, "the defendant, in short, by consent, pleads, 1st. Non assumpsit. 2d. Payment. 3d. Off-set. 4th. Tender. The plaintiff took issue on the first, second, and fourth pleas, and demurred to the third, and his demurrer being overruled, he replied to said

plea, "that the said Clementina M. Walke is a married woman, and that the plaintiff is suing as the trustee of her separate estate, for a monied demand." The defendant demurred to this replication, and the demurrer was sustained by the court. A bill of exceptions is found in the record, from which it appears, that the plaintiff introduced as evidence a transcript from the chancery court at Cahawba, shewing the appointment in June, 1847, of the plaintiff, as trustee of the separate estate of said Clementina M. Walke, and a decree in his favor, as such trustee, against one Jackson, the former trustee, who had been removed, for $1680. The plaintiff further proved the issuance of execution on said decree, the collection of the money by the sheriff of Dallas, and the receipt by defendant, as the solicitor of record in the cause, of $584 32 of said sum, on the 8th Sept. 1847. It was admitted, that defendant had paid to Mrs. Walke, or by her order, $176 95 of the amount received by him; that plaintiff had made a demand of him for the balance before suit brought, and that he had tendered him $11, which the plaintiff refused to receive in full discharge of the demand. The husband of Clementina M. Walke was introduced by the plaintiff, to prove the loss of the deed of trust made by him for her benefit, and stated, that he had placed the deed in the hands of the defendant about two years ago, whilst the defendant was acting as the solicitor of his wife in the said chancery cause; that afterwards, and before the appointment of plaintiff as trustee, the witness, then acting as the agent of his wife, had called on defendant for it, who stated to him that the deed was not in his possession, and he thought it was in the office of the register; that the witness then applied to the register for it, and after a search in his office, the register was unable to find it there; that he also called on Lapsley & Hunter, attorneys at law, in whose possession the deed had once been, and could obtain no information of it from them; that when witness last saw the deed, it was in possession of defendant, and that his relations with the plaintiff were such as satisfied him, that he has never had it. The defendant stated to the court, that he had had the possession of the deed, but had not seen it in two years, and did not know what had become of it; that when the witness, Walke, called on him for the

deed, this suit had not been instituted; that he had received no notice to produce it on this trial, and consequently, had not made diligent search for it, and that it might possibly be in his possession, without his knowing it. Upon this proof, the plaintiff offered to read a certified copy of the deed in evidence, but the court excluded it, and charged the jury, that the original deed of trust not being produced, the plaintiff could not recover. The plaintiff thereupon took a non-suit, with leave to tender his bill of exceptions, and now assigns the several rulings, and the charge of the court, as error. The defendant also moves to dismiss the writ of error.

Watts & Jackson, for plaintiffs in error.

1. As to the demurrer to the plea of offset, a plea "in short by consent," must contain matter of substance. Gayle v. Randall, 4 Porter, 232; Saddler v. Fisher, 3 Ala. 200. No plea of offset could be admitted against the plaintiff in this suit, in his individual right: no offset could be admitted in the court at law, against the equitable plaintiff, Mrs. Walke. It is too clear for argument, that a debt due by Walke himself, could not be used against Mrs. Walke's trustee.

2. That a proper foundation had been laid to let in secondary evidence, see Morrow v. Campbell, 7 Por. 41; Swift v. Fitzhugh, 8 Por. 39; Jones et al. v. Scott, 2 Ala. 58; Sturdevant v. Gaines, 5 ib. 435; Sledge v. Clopton, 6 ib. 589.

3. The charge should have been given upon the proof, as shown by the bill of exceptions. The deed was not necessary. Byrd, the defendant, had collected the money as the solicitor in chancery for the plaintiff in this suit, suing as the trustee of Mrs. Walke, and it did not lie in Byrd's power to deny Shields's right to recover the money.

4. The act of 1846, concerning non-suits in legal proceedings, provides, "that in all cases, when it may be necessary for a plaintiff in any proceeding at law, to enter a non-suit, by reason of the determination of the court before whom such proceeding may be pending, upon a matter of law, it shall be lawful for such plaintiff to move the supreme court at the ensuing term, to set aside such non-suit, when the supreme court shall consider the points of law arising upon said non-suit, and set aside, or confirm, the same, as the law shall

be found." It is further provided, in the same act, "that if the record should not of itself discover the point upon which such non-suit may depend, such point, or points of law, shall be exhibited by bill of exceptions; and the party may have his writ of error, as in other cases in which writs of error are allowed by law." See Acts of '45-6, p. 35.

5. The bill of exceptions shows that the non-suit was taken in consequence of the determination of the court upon a matter of law, and that the non-suit was not voluntary.

6. If the notice should be considered defective, we move for another to issue out of this court.

7. If it is considered, that a formal motion to set aside the non-suit is necessary, it is asked that this may be considered as a motion. But it is insisted, that no formal motion is necessary; that the assignment of errors is a sufficient motion; and this is in accordance with the practice of the court under this statute. McCall v. Sinclair, 14 Ala. 764.

Evans, contra. The defendant moves to dismiss the writ of error, because—

1. The record does not show such a case as authorizes writs of error to be sued on it. It does not show that it was necessary for the plaintiff to enter a non-suit, by reason of the determination of the court upon matters of law, &c. See act of 4th February, 1846. The judgment should show this, otherwise, it is a voluntary non-suit. The judgment does not show this; and if it were competent to refer to the bill of exceptions to supply this omission, which we deny, still it could be only by inference and conjecture, that this fact could be deduced from the statements in the bill of exceptions. A bill of exceptions is allowed by the statute for a particular purpose, viz., to exhibit the point relied on by the plaintiff, when the record does not show it. See act of 1846, *supra*. The only motion in this court, is to "set aside the non-suit," and all the court can do, is to set aside or confirm. As no such motion is made, we move here to strike out the assignments of error, and to dismiss for want of proper motion.

2. There is no notice to defendant: the notice in the record was issued and served on the 21st day of December, 1848—the writ of error was issued on the 22d. There was

no such cause as described in the notice when it was issued and served, and it was consequently a nullity. In respect to the evidence offered to authorize the reading of a copy of the deed, it was clearly insufficient. The absence of the original was not sufficiently accounted for. In respect to the materiality of the deed, it appears, that the plaintiff himself deemed it material—offered voluntarily to prove its contents—we cannot say, in the present aspect of the case, as presented by the bill of exceptions, that the deed was unnecessary, or that the action could be sustained without it. Nor does it appear, that the non-suit had any thing to do with the ruling of the court upon this point. It does not appear that the non-suit was the consequence of such ruling.

CHILTON, J.—1. Although the judgment entry does not show that the plaintiff took the non-suit in consequence of the ruling of the court against him, in the exclusion of the copy of the trust deed, yet we think it very clear, that under the act of 1846, (see pam. acts '45-6, p. 35,) it is not indispensable that the fact should appear in the bill of exceptions. Here, it is sufficiently made to appear by the bill of exceptions, which, after reciting the rejection of evidence material to the plaintiff's recovery, states, that "thereupon the plaintiff took a non-suit." The motion to dismiss the writ of error must therefore be overruled.

2. As to the insufficiency of the notice, being dated the day previous to the date of the issuance of the writ of error, we must intend this was a clerical misprision, and as the writ of error is amendable, we must regard it as amended.

3. Turning to the points presented by the assignment of errors, we think it clear, that the decision of the county court overruling the demurrer to the plea of set-off, pleaded as it is, merely by name, cannot be sustained. The plaintiff had a right to have the plea formally, or rather substantially pleaded, if he insisted upon it, and it is peculiarly proper, in cases of this sort, when the party desires to be advised of the special matter relied upon, that it should be substantially averred. There was no consent on the part of the plaintiff to receive the plea as it was pleaded, and it was clearly errone-

ous to hold it good. See Strange v. Powell, at the present term, and authorities on the brief of plaintiff's counsel.

4. We regard the predicate which was laid for the introduction of the secondary evidence of the deed from John M. Walke, as entirely sufficient. The deed was shown at one time, (and the last time it was seen by the witness,) to have been in the custody of the defendant, who was the solicitor of the party beneficially interested under it. He was called on for it some time before the commencement of this suit, and replied that he did not have it, but thought it was in the register's office. The register's office was searched, and it could not there be found, and other efforts were made to procure it, but proved ineffectual. Under such circumstances, it was not incumbent on the plaintiff to have notified the defendant to produce the deed; but he might rest upon his statement, that he did not have it, and having searched for it diligently, where it was supposed it would probably be found, the secondary evidence was legitimate. No presumption can arise in this case, that the original deed is improperly withheld, and in such cases, the rule does not exact such a rigid search and examination, as when a contrary presumption may be indulged. Jones v. Scott, 2 Ala. Rep. 61. The defendant, having been the solicitor of the party in the management of business connected with the deed, or requiring him to have it, is to be presumed acquainted with its contents, and if the copy tendered was incorrect, and he was mistaken in informing the agent of the beneficial plaintiff, that the deed was not in his possession, he should have taken some steps to have procured it. At all events, the plaintiff cannot be prejudiced by his mistake, if there was one, as to the possibility of finding the deed in his possession, upon search being made. He dispensed with the search in his office, by the declaration, and search was duly made, where it was supposed the instrument was. See Sturdevant v. Gaines, 5 Ala. Rep. 439; Sledge's adm'r v. Clopton, 6 Ala. Rep. 589, 604; Bright and Ledyard v. Young and Winslett, at the last term.

For these errors, the judgment must be reversed, and the cause remanded.

JONES v. POWELL.

1. In declaring on a contract, the declaration must show a binding agreement between the parties, and that it has been violated by the defendant.
2. If a valid contract is shown, and the promise of the plaintiff to do a particular thing, as the same is the inducement to the promise of the defendant, the plaintiff must aver a readiness to perform the contract on his part.

Error to the Circuit Court of Coosa. Before the Hon. George Goldthwaite.

Action of trespass on the case, by plaintiff, against defendant in error. The declaration describes the contract thus: "that on the 10th day of November, 1845, the defendant represented to the plaintiff, that if he would remove with his family to Texas, he would be entitled to three hundred and twenty acres of land, and that in consideration that the plaintiff would remove there with his family by water, and would convey to defendant one half of the land, to which the plaintiff would become entitled by settling with his family in Texas, he, the defendant, would pay the expenses of removing the plaintiff and his family to Texas: and that afterwards, to wit, on the same year and day aforesaid, it was further agreed, that the plaintiff should repair with his family to the city of Wetumpka, preparatory to the said removal: that in consideration of the promises thus made by said defendant to the plaintiff, the said plaintiff, in a few days thereafter, sold his stock, farming utensils and provisions, which could not be conveniently carried with him, at a great sacrifice, to wit, at a loss of five hundred dollars, and that afterwards, to wit, on the 13th day of November, in the year aforesaid, the said defendant told the said plaintiff, in effect, that he had abandoned the project of removing him and his family to Texas, in consequence of which abandonment of said agreement, and of the enunciation that said defendant would not comply with his said contract, the said plaintiff deemed it unnecessary for him to go with his family to Wetumpka, preparatory to their removal to Texas," &c.

The defendant demurred to the declaration, and the court sustained the demurrer. This is the error now assigned.

W. W. Morris, for plaintiff in error.
L. E. Parsons, contra.

DARGAN, J.—We do not think that the declaration sets forth a valid, or binding contract between the parties. It commences by stating, that the defendant represented to the plaintiff, that by removing with his family to Texas, he would be entitled to three hundred and twenty acres of land; and that if plaintiff would remove to Texas with his family, by water, that the defendant would pay his expenses, provided he would convey to the defendant, one half of the land to which he would be entitled. It is not stated that the plaintiff accepted this proposition, nor that he did agree to remove with his family to Texas. But the declaration goes on to aver, that it was agreed, that the parties should meet at Wetumpka, preparatory to their removal. This is the only agreement stated in the declaration. Before the time appointed that the parties should meet, the defendant gave notice that he had abandoned the project, in consequence of which, the plaintiff did not repair with his family to Wetumpka.

In declaring on contracts, the declaration must show a binding agreement between the parties, which has been violated. If a valid contract is shown, and the consideration is concurrent, that is, if the promise of the one, is the consideration of the promise of the other, to do a certain thing at the same time, the plaintiff must aver a readiness, and willingness, on his part, to perform the promise. Chit. Plead. 296; Porter v. Rose, 12 Johns. 209; 8 Gill & Johns. 248.

Tested by these rules, the declaration is entirely defective. The inducement, or consideration, of the defendant's promise, is, that the plaintiff would convey to him one half of the land to which he would be entitled by his removal to Texas. The declaration does not show, that the plaintiff agreed to convey to defendant, one half of three hundred and twenty acres of land, if entitled to it by his removal; nor does it aver a readiness, and willingness, to fulfil the agreement. If we could consider the declaration as describing a valid contract,

as the promises are concurrent, an averment that the plaintiff was ready, and willing, to perform his promise, is indispensably necessary.

In no point of view, can the declaration be sustained, and the judgment is consequently affirmed.

POOL v. REID.

1. A defendant in execution, may sell articles exempt by law from sale by execution, after the execution comes to the sheriff's hands, and convey a good title to the purchaser. But if the thing received as an equivolant, or in exchange, is not also exempt from levy, or sale, it may be levied on.

Error to the Circuit Court of Walker. Before the Hon. Samuel Chapman.

This was an action of trespass *vi et armis* by plaintiff against defendant in error. It appears that the defendant, as sheriff of Walker, levied on a pair of oxen, in the possession of the plaintiff, under an execution in his hands, against the plaintiff and another person, whose name is not mentioned in the record, as the property of the latter. The defendant in execution, as whose property, the oxen were levied on, whilst in his possesion, had no other oxen, nor had he a work horse, or mule. During the time the execution was in defendant's hands, this other person sold the oxen to the plaintiff, who was in the same predicament as to goods and chattels, with his vendor.

Under this state of facts, the court charged the jury, that the oxen were subject to levy and sale, and that the plaintiff could not recover. To this charge the plaintiff excepted, and now assigns it as error.

Earnest & Wilcox, for plaintiff.
T. M. Peters, for defendant.

COLLIER, C. J.—It is provided by the act of 1833, "that one work horse, mule, or pair of oxen, one horse or ox cart, &c." shall be retained by, and for the use of every family in this state, free and exempt from levy and sale, by virtue of any execution, or other legal process." Clay's Dig. 210 § 47. The act of 1843, declares, that in addition to the property then exempt by law, from execution, for the use of every family in this state, upon all debts thereafter to be contracted, "forty acres of land (for the purposes of cultivation, not to exceed in value four hundred dollars, to be valued by three disinterested free holders, to be summoned by the sheriff, for that purpose, in case of a levy) shall be, and inure to the use and benefit of permanent, and settled families:" *Further*, "When any homestead shall be sold by the owner, it shall be subject to the payment of every judgment against him, or her, at the time of said sale." Clay's Dig. 210 § 48,49.

We have had occasion to consider the act of 1833, in quite a number of cases, and have said, that it "was doubtless intended for the benevolent pnrpose, of enabling the head of a family to support, and at the same time, contribute to the comfort and convenience of those of his own household, who are dependent on him." To carry out this intention, we have held that it should receive a liberal, rather than a strict construction. Noland v. Wickham, 9 Ala. 169. See also Allen v. Mannasse & Mosely, 4 ib. 555; Abercrombie v. Alderson, 9 ib. 981. In Jordon v. Autrey, 10 Ala. Rep. 276, it was decided, that a party who has pointed out property, which is exempt from levy and sale, by the act of 1833, to an officer having an execution against his goods and chattels, and executed a forthcoming bond, is not estopped from objecting to the sale, and claiming the privilege, to which a poor debtor is entitled; especially if the plaintiff in execution, or some third person, is not prejudiced by the implied waiver of the exemption, as indicated by the direction to levy. So we have determined, that the exemption provided by the act applies, whether the "family" is stationary, or removing from place to place, and although its head may intend to abscond from one part of the state to another; it is questioned, whether a different rule would be applicable, even if the intention was to abscond beyond the state. Davis v. Allen 11

Ala. Rep. 164. In the State v. Johnson, 12 Ala. Rep. 840, in considering the nature of the legislative exemption, we held, that the defendant in execution, of the class provided for, might defend his possession, by the employment of such reasonable force as is necessary, even against an officer armed with process, directing the seizure of his goods and chattels. It was said to be "the intention of the the legislature, that these articles of prime necessity, for the comfort of the family, should be kept inviolate for its use, and it would, in a great measure, defeat the object of the law, if the defendant was required to submit to such a levy, and seek redress against the officer by action." So we have decided it to be a violation of duty, for a sheriff to levy on the only work horse of a defendant who came within the statute, and that a bond to indemnify the sheriff for selling the horse was illegal and void. Renfro v. Head, 11 Ala. Rep. 23. In Davis v. Allen *supra*, we determined, that the act of 1843, which secures to "permanent and settled families," forty acres of land, and makes it liable, if sold, to all pre-existing judgments against the debtor, was entirely distinct in its provisions, from the preceding enactment; and did not in any manner limit its operation.

It is clear, from these citations, that a *fieri facias* does not operate a lien, from the time of its delivery to the sheriff, upon the "goods and chattels" of the defendant, which are "exempt from levy and sale, by virtue of an execution, or other legal process." Such was the predicament of the oxen, which were levied on and sold, while the property of one of the defendants in execution, and afterwards when they were purchased of him by his co-defendant, the plaintiff in this action. The statute, we have seen, does not inhibit an execution debtor from selling, the *exempted property*, and this court cannot declare that such a restriction exists; if, however, he makes a sale, or other disposition of it, it would be allowable to levy on what is received as an equivalent, if it can be reached, and does not belong to the *same category*.

By disposing of the oxen, after the *fieri facias* was placed in the sheriff's hands, the defendant who then owned them, at least indicated that he did not intend to yield them up, to be sold by the sheriff. The sale was an act antagonistic,

and tends strongly to show, that he made no concession to the interest of the plaintiff in execution.

The plaintiff, in this action, who was a joint defendant in execution with his vendor, was also entitled, from the time of his purchase, to claim the statute exemption; for it seems, that neither of them had *any work horse, mule, or other pair of oxen.* Each of them, so long as he was the proprietor of the oxen, could assert the right to hold them against a creditor. The plaintiff does not assert the privilege, to which his co-defendant was entitled, but has set up an exemption personal to himself and his family. This, we have seen, it is entirely competent for him to do, under the proof in the record. The ruling of the circuit court was adverse to these views—its judgment is therefore reversed, and the cause remanded.

BARNETT ET ALS. V. THE STATE, EX REL.

1. A judge of the circuit court, has the power to grant a writ of *certiorari*, returnable to said court, to correct the errors of the commissioners' court of roads and revenue, in altering and changing a public road, and to take cognizance thereof.
2. The record, of a court of limited jurisdiction, must contain every fact, essential to the validity of its judgments, and when, in the record of proceedings of the commissioners' court of roads and revenue, in altering and changing a public road, it does not appear, that thirty days' notice of the application had been given, a decree, altering and changing such road, is erroneous, and is properly quashed.

Error to the Circuit Court of Montgomery. Before the Hon. George Goldthwaite.

THIS was a proceeding by *certiorari*, sued out at the instance of the State of Alabama *ex rel.* Dr. Francis L. Gilmer, to correct the errors of the commissioners' court of roads and revenue of Montgomery county, in its action on an application of Thomas M. Barnett et als., to alter and change a pub-

lic road. A transcript of the proceedings of the commissioners' court, is appended to the petition for the *certiorari*, and is found in the record. There is nothing in the transcript of the proceedings of said court, to show that thirty days' notice was given of the application for the change of the road. The circuit court quashed the order for the alteration and change of the road; and the action of said court in the premises, is now assigned as error.

MAYS, for plaintiffs in error.

1. The jurisdiction of the court of roads and revenue, attached as soon as the petition for a change of road was presented. 6 Porter, 268, 219.

2. Jurisdiction appearing, the maxim, *omnia presumuntur rite acta esse*, applies. 4 Phil. Ev. C. & H.'s Notes, 1014, and cases there cited.

3. After jurisdiction appeared, the circuit court ought not to have quashed, for any subsequent irregularity on the face of the proceedings; nor ought the court to have examined the proceeding further, than to have ascertained, if the inferior court kept within its jurisdiction. 2 Hill, 14; 19 Wendell, 342.

4. Our statutes and laws, do not contemplate that any court in Alabama, should supervise the proceedings of the court of roads and revenue. 6 Porter, 199; 11 Ala. 247.

5. The circuit judge should not have granted the writ of *certiorari* in this case, because the public convenience was opposed to it. 15 Wendell, 206; 2 Term R. 234; 1 Coxe, 318.

6. The circuit court should not have granted it without notice. 6 Mass. 72; 12 Wendell, 292.

7. The writ should not have been granted by the circuit judge at chambers. 9 Wend. 433; 5 ib. 98; 6 Mass. 72.

8. The circuit court judge should not have granted the writ for defects in the form of the orders. 4 Mass. 565.

9. He should not have granted it, because the act complained of was not judicial. 2 Hill, 21; Bac. Ab. *Certiorari*, B; Caldwell's Cases, 309.

10. If the writ improvidently issued, this court should

quash it, and thus render the judgment which the circuit court ought to have rendered. 15 Wend. 203, 211.

T. & J. Williams, contra.

1. The circuit court was correct in quashing the proceedings of the commissioners' court of roads and revenue, in establishing the change in the road in controversy, known as the Montgomery road: 1. Because it does not appear from the record, that the persons, petitioning for said change in said road, gave the thirty days' notice of the intended application, &c. Clay's Dig. 507, § 3, proviso. 2. Or that the jury of review, who marked out the change in said road were sworn, as the law requires; or that they were householders. See particularly § 4, Clay's Dig. 507; Lester v. Vivian et al. 7 Por. 375. 3. Because the jury marked out the road (as shown by the record) totally different from the change proposed by the petitioners, in their petition to commissioners' court.

2. Where the proceedings of an inferior court are different from the common law, and no mode of revision is given by the statute, a *certiorari* will lie to correct any error which may have occurred. Com. v. Ellis, 11 Mass. 466; Ex parte Tarleton, 2 Ala. 35; Williamson v. Cornan, 1 Gill & Johns. 196, and authorities there cited; 5 Binn. R. 27.

CHILTON, J.—The precise points raised by the record before us, viz., whether the proceedings of the court of roads and revenue could be revised upon *certiorari*, upon the application of a party injured thereby, as also, whether it was necessary for the record affirmatively to show, that the notice required to be given by the statute (Clay's Dig. 507, § 3) had been given, were decided by this court at the last term, in the case of the Commissioners of Roads and Revenue v. Thompson, and ruled adversely to the plaintiffs in error.

We have re-examined that case, as well as the authorities referred to by the counsel for the plaintiff in error in this, and have come to the conclusion, that the principles of law are there correctly laid down. The case before us, must be affirmed, upon authority of that. Judgment accordingly.

BROWN v. TURNER.

1. When a bill of exchange has been accepted by two persons, as partners, who at the maturity of the bill, have dissolved their partnership, and are also absent from Mobile, the place of their residence, a demand of payment made of an agent of one of the partners, is sufficient.
2. It is no ground for taking the deposition of a witness, to be read in a suit depending in Choctaw county, that the witness resides in Mobile; though Choctaw was taken in part from Washington county, where such a privilege exists.

Error to the County Court of Choctaw. Before the Hon. Geo. F. Smith, Judge.

The facts of this case are stated in the opinion of the court.

J. A. Campbell, for plaintiff in error.

The averment of presentation, in this case, is insufficient. The absence of the partners, and the dissolution of the firm, did not authorize the presentment to an agent of one of the partners. The bill was not made payable at any particular place, and it was the duty of the holder to ascertain where the acceptors were, and to make presentment to them at the place where they were. Taylor v. Snyder, 3 Denio, 613; Chitty on Bills, 261; 2 Watts & Serg. 401.

After the dissolution of a firm, the presentment must be made to the partners separately, to charge the dawer or indorsers, unless one of the partners is charged with the settlement of the affairs of the firm. Union Bank v. Willis, 8 Metc. 504; 5 Hill, 234; 4 Cowen, 126; 1 Conn. 368.

The presumption of a joint agency for the drawer, is repelled by the fact of dissolution, and it is the duty of the holder to inquire of each of the acceptors for payment, before he is entitled to call upon the drawer. Cases above cited; Story on Prom. Notes, § 294.

Notice to, and acknowledgment by, a member of the firm, binds the partnership only during its continuance. Story on Part. 160.

The depostions should not have been admitted, in conse-

quence of the mistakes in executing the commission, and the irregularities stated in the bill of exceptions.

DARGAN, J.—This was an action of assumpsit, on a bill of exchange, brought by the indorsee, against the drawer. It is objected, that the declaration does not show, that payment was demanded of Austill & Marshall, the acceptors. The averment is, "that when said bill became due and payable, to wit, on the 12th day of November, 1844, to wit, in the city of Mobile, the said bill was presented, and shown by John A. Hitchcock, a notary public, to the agent of said Marshall, one of the firm of Austill & Marshall, both Austill and Marshall being absent from the city, and their partnership being dissolved, and payment thereof demanded.

We think the declaration shows a sufficient demand. It is said, that if the acceptance be by partners, then the presentment for payment should be made at their place of business, or at the dwelling of either of the partners. Story on Bills, § 362; Bayley on Bills, 285, 286.

A demand of payment of one, is a demand of all; nor can the dissolution of their partnership, before the bill falls due, vary the rule, or render it necessary that a separate demand should be made of each. As both members of the firm were absent from the city, a demand of the agent of one, is sufficient to charge the drawer.

2. In the progress of the trial, the depositions of two witnesses were offered as evidence, to the reading of which, several objections were made by the defendant. The first is, that the affidavit was insufficient to authorize the issuance of the commission. The affidavit states, that the testimony of the witnesses was material, and they reside in the city of Mobile. We know of no statute, that authorizes the taking of depositions to be read on trials at common law, on the grounds stated in this affidavit. By the act of the 21st January, 1845, it is lawful in any suit, pending in the courts of Washington, Clarke, or Monroe, to take the deposition of a witness whose testimony is material, and who resides in the city, or county of Mobile. But this act cannot be extended, so as to embrace the county of Choctaw, although the county of Choctaw has been formed since the passage of the act, out

of parts of the counties of Washington and Sumter. The mode of taking testimony by deposition, to be used in trials at law, is allowed by statutes only, and is in derogation of the rules of evidence at common law, and should be strictly pursued. To authorize the taking of the deposition of a witness, on the sole ground that he resides in the county, or city of Mobile, it must be shown, by the affidavit, that the suit is pending in one of the counties of *Washington, Clarke*, or *Monroe*.

Before the testimony of a witness, taken by deposition, can be read as evidence, the party at whose instance the deposition is taken, must show, that an affidavit has been made, setting forth some of the several grounds that authorize the issuance of a commission. The affidavit in this case, discloses no ground for issuing the commission, and is therefore fully defective. As this objection is fatal to the whole deposition, it is unnecessary to notice the other objections.

Let the judgment be reversed, and the cause remanded.

BANCROFT v. PAINE, USE, &c.

1. If a defendant wishes to impeach the *factum* of the assignment, of a note sued on, to the plaintiff, he must annex to his plea, denying the assignment, an affidavit, that he verily believes the assignment is forged: or he must make oath to that effect in open court.
2. An affidavit merely verifying a plea, "that the note was not at any time endorsed and delivered to the plaintiff, nor had he any equitable or legal interest in it, at the commencement of the suit, or at any time before," is insufficient, and a demurrer, to a replication to such plea, should be visited upon the plea.
3. The holder of a note, endorsed in blank, *may* fill up the endorsement with the name of the endorsee.
4. If the plaintiff is invested with the legal title to a note sued on, *it is unnecessary* to fill up the blank endorsement, although the declaration describes it as endorsed to the plaintiff.
5. An agent, to whom a note, endorsed in blank, has been transmitted for

collection, may sue on it, in his own name. The principal alone has the right to object to it.

Error to the Circuit Court of Mobile. Before the Hon. John Bragg.

This was an action of assumpsit by defendant, against plaintiff in error, on a promissory note for $250, in favor of George Bancroft, and by him endorsed in blank.

The plaintiff in error filed six pleas, the fourth of which is as follows: "And for further plea, in this behalf, the said defendant says, *actio non, &c.*, because, he says, that the said promissory note, was not at any time endorsed and delivered to the said Parker Paine, nor had he any equitable or legal interest in the said promissory note, at the time of the commencement of this suit, or at any time before, and this he is ready to verify." To the pleas is appended an affidavit, as follows; "Charles Bancroft, being duly sworn, deposeth and saith; that the allegations of the fourth plea, above pleaded, he verily believes are true." The defendant in error, replied to the fourth plea, that the note was endorsed by George Bancroft, as the security of plaintiff in error, and was delivered to one Tarpley, and by Tarpley was delivered, for value, to one Pierson, from whom defendant received it for collection, as his trustee. The plaintiff in error demurred to this replication, and the demurrer being overruled, he then took issue. From the bill of exceptions it appears, that after the pleadings were made up, and the defendant in error was about to put his case to the jury, by leave of the court, the opposite party objecting, he filled up the blank endorsement of George Bancroft, by writing above it, "Pay the within, to Parker Paine. The proof showed that Pierson, for whose use the suit was brought, lived in New Hampshire, and had sent the note to defendant in error for collection, and that the latter had no other interest in the note.

The plaintiff in error, requested the court to charge the jury, that if they believed the evidence, defendant in error could not recover, which charge the court refused to give, but instructed the jury, that the reverse was the law. To the ruling and charge of the court, the plaintiff in error excepted, and now assigns them as error.

C. W. Rapier, for plaintiff in error.

1. The suit was upon a promissory note, payable to George Bancroft, or order, and negotiable and payable at the branch of the state bank at Mobile. The defendant pleaded that the note had not been endorsed and delivered to the plaintiff, and that the plaintiff had at no time an equitable and legal interest in the note, and verfied the plea under oath. The plea so verified was good, and the demurrer to it was correctly overruled. See Beal & Bennet v. Snedicor, 8 Por. 523; Jennings v. Cumming, 9 ib. 309; Tarver v. Nance, 5 Ala. 712.

The replication to the plea was bad, because it showed that the plaintiff held the note merely as agent, to collect it. This was neither matter of traversal or avoidance of the plea. The demurrer to the replication should have been sustained.

After the pleadings were made up, and the case was about to be submitted to the jury, it was error to permit the plaintiff to endorse the note to himself. If such leave may be granted, when the ownership of the note is not questioned, it does not follow, that it may be granted when the fact of ownership is put directly in issue, and the presumption of ownership is thereby repelled.

The charge of the court to the jury, that the plaintiff might recover, whether he had an interest in the note or not, and the refusal of the court to charge otherwise, were errors. See Bryant v. Owen, 1 Por. 201: the same v. the same, 2 S. & P. 134; Thatcher v. Winslow, 5 Mason, 58; 10 Johns. 398; Sherwood v. Roys, 14 Pick. 172; Kennedy v. Manship, 1 Ala. 45; Moore v. Penn, 5 Ala. 135: 2 Dall. 144.

The endorsement of the note, under the circumstances, passed no title. It was not an endorsement in legal acceptation. It was without consideration, and had not been delivered in the course of trade. The plaintiff's right to maintain his action on the note, was no better that if the note had been stolen.

The act of 1819, Clay's Dig. 341, sec. 158, applies to assignments, where it is necessary, there should be a written assignment, to pass the legal title. It would be useless and unmeaning, in reference to obligations, in which title pass-

es by delivery. If so, the ownership of the note was questionable, under the general issue.

G. N. Stewart, contra.

Parker Paine appears before the court, suing Charles Bancroft as maker of a note. The note was made payable to the order of George Bancroft, and indorsed by him to Paine.

Paine sues for the use of Thomas Pierson: he is the agent of Pierson—sues for his use, and by his authority—he holds the legal title as indorsee for Pierson's use.

The appellant denies the right of the trustee to sue for the use of the party having the equitable interest, although he is invested with title, with assent of the beneficiary. This objection cannot be maintained.

The indorsement by George Bancroft was in blank, and was filled at the trial. This was clearly allowable. 7 Por. 181, and authorities cited; 5 Randolph, 326; 5 Munf. 388; 5 Call, 61; Story on Prom. Notes, No. 126.

The party having the legal title may, and must, sue for the use of the party having the interest, and no one else can sue; and whether such party having the legal title, be merely an agent or servant, or not. 3 Ala. R. 347; 3 Porter, 112; Story on Prom. Notes, § 124; 5 Ala. 135; 8 Porter, 122; 2 S. & P. 140, 139; 1 Stew. 169.

A note is, of itself, a distinct cause of action, and needs no extrinsic averment. 8 Por. 445. And so is an indorsement.

COLLIER, C. J.—1. The act of 1819, "to regulate the proceedings in the courts of law and equity in this state," enacts, "when any suit shall be instituted by any person or persons, as assignee or assignees, of any bond or other writing, it shall not be necessary for the plaintiff or plaintiffs, to prove the assignment or assignments, unless the defendant or defendants, shall annex to a plea denying such assignment or assignments, an affidavit, stating that such defendant or defendants, verily believe, that some one or more of such assignments were forged; or make oath to the same effect in open court, at the time of filing such plea." Clay's Dig. 341, § 158. In Tarver v. Nance, 5 Ala. Rep. 712, the defendant in the circuit court, pleaded, that the bill declared on, was

not the individual property of the plaintiff; that an association of individuals, styled "the Real Estate Banking Company of South Alabama, at Selma," were its proprietors, and that after it was indorsed to them by a blank indorsement, the plaintiff inserted his name, as the last indorsee. It was held, that the plea was defective, because it was not verified as the statute requires. To the same effect are Beal & Bennet v. Snedicor, 8 Por. Rep. 523, and Jennings v. Cummings & Mason, 9 Port. Rep. 309. See also Fowlkes & Co. v. Baldwin, Kent & Co. 2 Ala. Rep. 705; Lazarus, use, &c. v. Shearer, ib. 718; McWhorter, v. Lewis, use, &c. 4 Ala. R. 198. It is perfectly clear, that the affidavit by which the fourth plea, in the present case, is verified, does not conform to the requisition of the statute; and as the plea does not allege, that the indorsement under which the plaintiff deduced a legal title was forged, it cannot aid, and supply the defects of the affidavit. The cases cited sufficiently establish, that as the plaintiff's right to maintain the action, or his title to the note, depends upon the indorsement, the defendant can only put that fact in issue by a denial of the indorsement, stated in the declaration, by a plea duly verified. When an affidavit of the truth of a plea is necessary, the want of it is a defect, available on demurrer. Martin v. Dortch, 1 Stew. Rep. 479; McWhorter v. Lewis, *supra*. Here, an affidavit, or oath, was indispensable to the sufficiency of the plea--the defendant adopted the former as the mode of verification, and it being insufficient, the demurrer to the replication should have been visited upon the plea.

2. It is well settled, that it is competent for the holder of paper indorsed in blank, to insert the name of the indorsee. Kennon v. McRea, 7 Por. Rep. 175, 181. And if the plaintiff is invested with the legal power, it is unnecessary to fill up a blank indorsement, even when the description in the declaration is, that the note was indorsed to him. Riggs v. Andrews & Co. 8 Ala. Rep. 628; Sawyers, adm'r, v. Patterson, 11 Ala. Rep. 523. This being the law, it is quite immaterial when the name of the indorsee is inserted, or whether the indorsement is filled up at all.

3. The material question in the cause, is, whether a party to whom a note indorsed in blank is transmitted as an agent

for collection, can insert his own name as the indorsee, and maintain an action against the maker? In Bryant v. Owen, 2 Stew. & P. Rep. 134, it was said to have been often decided, that one holding a bill, check, or note, as bearer or indorsee (though a mere agent), has such a legal right as entitles him to maintain an action on the security. Yet it was held in that case, to be competent for the defendant to controvert by plea, the plaintiff's right to sue as bearer, on a note payable to a third person, or bearer. The court added, "it is not intended to intimate an opinion, that if it appeared in evidence, that the plaintiff held the note only as agent for the rightful owner, and had by his authority, express or implied, orally or in writing, sued in his own name, that he could not have so recovered." It must, however, be remarked, that issue was taken on the plea, which controverted the plaintiff's title, and the question arose upon the admissibility of evidence to sustain it.

The same case came before this court at a subsequent period, (1 Port. Rep. 201) upon the same state of the pleading, and it was then decided, that an agency, such as created by the relation of client and attorney, does not authorize the latter to sue in his own name on the note described in the declaration; and that the consent of the client to the prosecution of the suit, will not make a different rule applicable.

These adjudications are not decisive of the case before us. It may be well questioned, whether judgments adverse to the plaintiff, might not have been rested alone upon the form of the issues. But however this may be, the first decision merely determines, that under the pleadings, it was competent to show the plaintiff's want of title—leaving it for future consideration, whether such evidence might not be countervailed by proof of the assent of the owner to the prosecution of the suit. The second decides, that an attorney at law cannot sue in his own name, on paper placed in his hands to be put in suit, although his client consents. We will not stop to criticise either of these decisions; for whether defensible or not, they do not furnish an answer to the question before us.

The right of the beneficial holder of a promissory note, to sue for his use, in the name of the party having the legal ti-

tle, is distinctly recognized in Moore v. Penn, use, &c. 5 Ala. Rep. 135. Mr. Justice Story says, "if the transfer of a promissory note be to an agent, by an indorsement of his principal in blank, he may treat the note as between himself and all the other parties, except his principal, as his own, and fill it up in his own name; or he may hold it for his principal, and act in his name." Story on Prom. Notes, § 126; see also § 246. To sustain these positions, the learned author cites a great number of cases, and as denying it, he only refers to three, one of which is Thatcher v. Winslow, 5 Mason, 58. There, speaking from the bench, he determined that an agent to whom a negotiable note has been indorsed by his principal, for the benefit of the latter, and who has no interest in the note, cannot sue as indorsee upon the note: *Further*, no person can sue as indorsee, unless he be the owner of the note, or has some legal or equitable interest therein. The opinion in which these conclusions are announced, is not attempted to be supported by argument or authority. The other citations are Wilson v. Holmes, 5 Mass. Rep. 543; Sherwood v. Roys, 14 Pick. Rep. 173. A reference to the cases which support the text of the author, will show that the question we proposed to consider, must receive an affirmative answer; that it is for the party entitled to the proceeds of the note when realized, to object that the suit is instituted without authority, or that the authority has been revoked. But if the agency is continuing, and recognized by the principal, the defendant cannot defeat the action, by showing that the plaintiff is only the mere conduit, through whom the money is to pass to the party entitled. It is needless to extend this opinion by collating cases. We have but to add, that the judgment is affirmed.

TUNSTALL v. DONALD & MARSHALL.

1. When the judgment entry recites, that the parties appeared, and the defendant said nothing in bar, &c. and a declaration is found in the record, setting forth a substantial cause of action, it will be deemed sufficient, though in the caption, the declaration is entitled, as of a term, subsequent to the judgment, which it will be intended is a clerical misprision.

Error to the Circuit Court of Baldwin. The record does not show before whom tried.

THE facts appear in the opinion of the court. The error assigned is, that judgment was rendered against plaintiff in error, in an action on two promissory notes, in favor of defendant, without declaration being filed.

JEWETT, for plaintiff in error.

1. A judgment by default, was rendered against the defendant below, at the spring term of the circuit court, 1848. The declaration in the case was filed as of the fall term following. This is a fatal error. Wheeler v. Bullard, 6 Port. 352; Napper v. Noland, 9 Porter, 218; ib. 511; Evans v. Bridges, 4 Por. 348; Wellborn v. Sheppard, 5 Ala. 674.

2. The declaration should be entitled as of the term when the writ is made returnable. This is material, and frequently determines the defendant's right to plead. Smith v. Muller, 3 Term R. 624; 1 East, 133.

3. We ascertain from the record, when the declaration was filed; and when this shows the declaration to have been filed subsequent to the judgment, this court will reverse. Evans v. Bridges, 4 Por. 348.

PERCY WALKER, contra.

CHILTON, J.—Judgment was rendered in this case by *nil dicit*, at the spring term, 1848, and the declaration contained in the record is entitled of the fall term, 1848, and the error assigned is, that the judgment was rendered without a declaration. It is certainly true, that a judgment by default,

where no declaration has been filed, is erroneous. Wellborn v. Sheppard, 5 Ala. Rep. 674; but the case before us is not in that category. Here, the parties appear, and the defendant says nothing in bar of the action, but it remains undefended. A declaration, setting forth a substantial cause of action, is in the record, and there is nothing in the record to advise us that it was not on file when the judgment was rendered, unless we must intend this fact from the caption, which entitles it of a subsequent term.

In Evans v. Bridges, 4 Por. Rep. 348, it was held, that it was not essential to a declaration, that it should be entitled of any particular term, and no matter what be its caption, or whether it have any—if it discloses a good cause of action, it will subserve its appropriate office.

It is the well settled rule, that no intendment is to be made adverse to the regularity of the proceedings in the primary court, and that error must be made affirmatively to appear, by the party who seeks the reversal. On the other hand, every reasonable intendment is to be made in favor of the judgment, so that, applying these rules to the case before us, it is very clear we must intend the title of the declaration is a clerical misprision; at all events, we are not permitted to look to the caption of the declaration which is on file, to reverse the cause, when such caption, at most, is but surplusage. It is more reasonable to presume, that a clerical mistake has intervened in the caption of the declaration, than that the court would have rendered a judgment without a declaration, and that one was improperly filed at a subsequent term.

This case is unlike the cases cited, of Wheeler v. Bullard, 6 Por. 352, and Wellborn v. Sheppard, 5 Ala. Rep. 674. In neither of those cases, was there a declaration on file. In this, the declaration is part of the record, and we must presume was on file when the judgment was rendered, as it does not appear to the contrary. Judgment affirmed.

CRABB v. PRATT AND WIFE.

1. At common law, the widow is entitled to dower, in those estates, only, of which the husband, during the coverture, was invested with the legal title.
2. Under the statute, (Clay's Dig. 157 § 36) the widow is entitled to dower, in those estates, the legal title to which, at the time of his death, is held by another, for the use or in trust for the husband, but she is not dowable of an imperfect equity.
3. Whether, if, after the death of his intestate, the personal representative pays a balance of purchase money, due upon real estate, purchased by the intestate, in his life time, and which constitutes a lien on the estate, the distributive share of the heir at law, in the personality, will not be chargeable therewith, quere?

Error to the Chancery Court at Mobile. Before the Hon. Jos. W. Lessene.

The bill in this case was filed by plaintiff in error, as the widow of Geo. W. Crabb, deceased, to obtain an allotment of dower, in certain real estate, in the city of Mobile. It alleges her intermarriage with said Geo. W., prior to 1844, and his death in Aug. 1846. It further states, that in April 1844, said Geo. W. and one William G. Jones, purchased the real estate in question, from the branch bank at Mobile, for which they received a certificate, setting forth, that titles were to be executed to them on the full payment of the purchase money; that they paid one fourth of the purchase money, at the time of the purchase, and gave their three several promissory notes, at one, two and three years for the balance, the two first of which, were paid by them, during the life time of the said Geo. W. Crabb, and the last, since his death, by said Jones, and the plaintiff, as the adm'x on the said Geo. W's estate: and that the bank, since final payment, has executed titles to said Jones, and Mary G. Crabb, a minor, and the sole heir at law, of the said Geo. W. Crabb.

The prayer of the bill is, that the said Mary G., be made a defendant, &c., and that dower be allotted to plaintiff in error, in the said real estate.

The chancellor dismissed the bill for want of equity, from which, a writ of error was sued. After the issuance of the writ of error, the said Mary G. Crabb, intermarried with one Pratt, and on suggestion thereof, the suit was revived in this court, against the husband and wife.

The dismissal of the bill by the chancellor, is now assigned as error.

W. G. Jones, for plaintiff in error.

1. The statute law of Alabama, Clay's Dig. 157 § 36, gives to a widow, dower in lands, to which the husband had only an equitable title. By the language of that statute, if the husband had *such an inheritance in the use, as, that if it had been a legal right, the wife would thereof have been entitled to dower;* the wife shall have, and recover, dower in such lands. To determine then, whether the widow is entitled to dower in lands, in which her husband had only an equitable interest, two questions are necessarily presented. 1. What is the nature and character, of the equitable estate of the husbandand? 2. If that equitable estate, were a *legal* one, would the widow be entitled to dower? If she would, then, by the plain language, and undoubted intention of the statute, she shall have dower, though her husband had only an equitable title.

2. In this case, after the purchase made by Geo. W. Crabb, in his life time, from the bank, in April, 1844, after he was put in possession of the property, and had paid three-fourths of the purchase money, though the legal title was retained by the bank, as a security, for the last instalment of the purchase money, yet undoubtedly Crabb had *some* interest in, and title to the lands; and it is equally certain, that, that interest and title was an equitable one, and not a legal one. What was the nature and character of this equitable interest, or title? What would it have been, if it had been a *legal*, instead of an equitable title? for this is the test prescribed by the statute. In this case, we insist that Crabb's interest, or estate, was a *base fee:* as to what constitutes a base fee, see 4 Kent's Com. 9 (3d Ed.) Here, by the contract contained in the certificate of purchase, the interest to be conveyed to Crabb, was a *fee, to him and his heirs;*

but this fee, might be defeated, by the subsequent happening two uncertain events, (the failure to pay the instalments punc- of tually, and the election of the governor, thereupon, to declare a forfeiture of the lands: Clay's Dig. 122 § 11,) neither of which might happen, and neither of which, did in fact happen. This is the exact characteristic quality of a base fee. If at the sale, instead of giving a certificate of purchase, the bank had done, what would have been the same in effect, that is had conveyed the land by deed, to Crabb, and his heirs, upon condition, that it should be forfeited, if the three credit instalments were not paid punctually, Crabb would have taken a base fee. The only difference between the effect of such a deed, and the certificate actually given, is, that the one conveys a legal title, and the other an equitable title. The statute says, this shall make no difference, as to the widow's right to dower.

3. The next question is, whether a widow is entitled to dower, in a base fee? It is an estate of inheritance, and the authorities are express, that a widow is entitled to dower in a base fee. Park on Dower 49, 54; 11 Law Lib. 23; 1 Cruise's Dig. title dower, ch. 3 § 8 mar. page 188.

4. The case before the court, is strictly analogous to the cases arising under mortgages, where it is held, that the widow is entitled to dower, as *against* the heir, even where she has relinquished her right of dower to the mortgagee. 4 Kent's Com. 44, 47, (3d Ed.)

5. The counsel for the defendant, supposes this case to be settled against the claim of plaintiff, by the recent decision of this court, in the case of Edmondson v. Montague, 14 Ala. 370, and also by the previous cases, of Gillespie v. Somerville, 3 S. & P. 447, and Lewis v. Moorman, 7 Por. 522. It is respectfully submitted, that these cases are distinguishable from the cases at bar. In the case of Lewis v Moorman, the very question now presented, is stated by the court, and said to be important and doubtful, and the court avoids deciding it. In the case of Edmondson v. Montague, it was denied that *any payment* had been made by the husband, and there was no proof of any payment, and the claim was against a purchaser, and not against the heir. In these material respects, that case is distinguishable from this. If any thing said in

that case, is applicable to this, it is only an *obiter dictum*. It is respectfully submitted, that in a case of such extreme hardship as this, on the widow, the court would not refuse to reconsider any prior decision, upon new argument, or auhorities, and if necessary, and proper, ovetrule such decision.

HOPKINS, contra.

A widow is not entitled to dower in land purchased and occupied by her husband during their coverture, for which he had not fully paid in his life time, and had not a conveyance, but a bond only for the title. The equitable title of which a widow is dowable, must be a perfect equity, and snch is not the character of the equity, where any part of the purchase money remained unpaid at the death of the husband. 3 Stew. & Por. Rep. 447; 7 Por. Rep. 522; 8 ib. 326; 14 Ala. Rep. 370; 1 Dev. Eq. Rep. 195. If the law confined the right of dower to an estate strictly legal, the right would not exist where the purchase money had been fully paid, but the legal title had not been conveyed to the husband. The statute gives dower where the husband had a full and complete trust of inheritance, that is, an unincumbered trust. If he had not the full and complete trust when he died, the statute does not entitle the widow to dower.

The right to dower is separate and distinct from that to a distributive share of the personal property. There is no dependence of one upon the other. The right to a share of personal property is in the excess of it, if any above what may be sufficient to pay the debts of the deceased husband. The right to dower is complete and irresistible, whether the estate be insolvent, or rich.

A motion to dismiss for want of equity may be made at any stage of the proceeding. Bryant v. Peters et al. 3 Ala. Rep. 160.

A *base fee* is created by grant. As a *base fee* and the grant contains no provision for its enlargement into a *fee simple*, nor obligation, as the title bond in this case does, for the conveyance upon the payment of the purchase of the *fee simple* to the grantee. The certificate in this case is in legal effect the same as a bond made by an individual to convey to a vendee the legal title, upon the payment of the purchase

money. No one ever supposed such a bond for title created a *base fee.*

DARGAN, J.—At common law, a widow was entitled to dower in all the lands of which her husband was seized at any time during the coverture; but if the husband had not the legal title, but was only entitled to the use, his widow, after his death, could not be endowed of this use. By our statute, however, it is provided, that "where any person to whose use, or in trust for whose benefit, another is, or shall be seized of lands, tenements, or hereditaments, hath, or shall have such an inheritance in the use, or trust, as that, if it had been a legal right, the husband or wife of such person would thereof have been entitled to curtesy, or dower, such husband, or wife, shall have, and hold, and may, by proper remedy recover, curtesy, or dower, in such lands, tenements, or hereditaments." Clay's Dig. 157.

Under this statute, if the legal title be held by one for the use of, or in trust for the husband, the widow shall be endowed of the land, in the same manner as if the husband had the legal estate. The only question, therefore, is, for whom, and for what purpose, did the bank hold the legal title to the premises sought to be charged with dower? Did the bank at any time hold the legal title for the use of, or in trust for General Crabb? The answer, to my mind, is plain: the bank was the owner in *fee;* the land was sold according to the provisions of law, and the legal title was held by the bank, not for the use of General Crabb, nor in trust for him, but for the purpose of securing the payment of the purchase money, and so continued to hold it, until the death of the complainant's *husband.* How, then, shall she be entitled to dower? By the common law she cannot, for the legal title never vested in her husband; and she can only claim dower under the statute, by showing, that the bank held the legal title for the use of, or in trust for her husband. But the bill on its face, shows, that one half of the purchase money was unpaid, at the time of General Crabb's death. The bank, therefore, held the legal title, to secure this portion of the purchase money, and not for the benefit of the purchaser. I should therefore say, without reference to any authorities,

that relying on the plain language of the statute, the complainant is not entitled to dower in the lands described in the bill, because her husband was never seized of the legal title, nor did any one ever hold it for his use. It is true, that if the entire purchase money had been paid by the husband, we should hold the complainant would have been entitled to dower; for it could not then have been said, that the bank held the legal title to secure the purchase money; for that being paid, the title could not have been held for that purpose, and in equity the bank would have been considered as holding the legal title, in trust for the purchaser.

But we are not left alone, to the plain import of the words of the statute, for it has received a uniform construction from this court, that is conclusive of the subject. Somerville v. Gillespie, 3 Stew. & Por. 347; Lewis v. Moorman, 7 Porter, 522; Rogers v. Rawlings, 8 Porter, 326; Edmondson v. Montague, 14 Ala. 371. All these cases hold, that to entitle the widow to dower, the equity of the husband must have been perfect, or complete, that is, he must have had the equitable right to demand the legal title of him, who held it for his use. It was said, in the case of Lewis v. Moorman, that what would be the right of the widow, when the husband left land on which a sum of money was due, and which the executor was bound to pay, was a question of grave importance. It may be in one aspect, that is, whether the heir's share of the personalty, shall not be charged with the payment of this sum, as he receives the entire benefit of the land. But certainly it is a plain question, when we look to the statute, and consider the right of dower as regulated by the rules of the common law. We must find that the husband had the legal title, or that the legal title was in another for his use, or we must refuse dower. The hardship of this construction of our statute, has been pressed on us with much force. We can only answer, that the statute was intended to modify some of the hardships of the common law; if it has not gone far enough, the legislature alone can extend its provisions.

There is no error in the decree, and it must be affirmed.

BOYD v. GILCHRIST.

1. In an action for money had, and received, on the common counts in assumpsit, it is admissible to prove, by the admission of the defendant, that a receipt given by the defendant to the plaintiff, for the collection of a note therein described, in which the plaintiff, Malcolm G., was described *Macom* G., was intended for the christian name of the plaintiff.
2. The plaintiff having proved, that the defendant received from him for collection, on the 20th February, 1839, a promissory note; that the maker of the note was solvent at the time, and continued so until the year 1843, being in possession of property, and money having been made out of him by suit, during that time, and that a demand had been made of him for the money a few days before the institution of the suit, on the 31st March, 1848, and the defendant having demurred to the evidence: held, first, that the court was justified, under the testimony, in rendering judgment for the plaintiff, but was not authorized, without further proof, to assess the damages, with which the defendant was chargeable, for interest on the debt collected by him.

Error to the Circuit Court of Macon. Before the Hon. Nathan Cook.

Action of assumpsit, by defendant, against plaintiff in error, on the money counts. The defendant in the court below, pleaded the general issue, and statute of limitations. The bill of exceptions found in the record, recites, that the plaintiff below produced in evidence the following receipt: "Rec'd of Macom Gilchrist, a note on Samuel McNiel, for the sum of one hundred and thirteen dollars, dated 6th Sept., payable the 25th Dec'r following, with interest from date. This note is rec'd for collection. Feb'y 20th, 1839. Jas. C. Boyd"—proved the handwriting of the defendant, and the admission of the defendant, that he gave the receipt to the plaintiff, and that the christian name of the party specified in the receipt, was intended for the christian name of the plaintiff. The defendant objected to the latter portion of the proof, but the objection was overruled, and the receipt, and proof, allowed to go to the jury. The plaintiff also proved the solvency of McNiel, from the date of the receipt to the

year 1843; that he had a plantation and negroes in Macon county, and that money had been repeatedly collected out of him by legal process, during this time. The plaintiff also proved a demand on the defendant for the money, a day or two before the institution of his suit, which was on the 31st March, 1848. The defendant was admitted not to have been an attorney at law. This was all the evidence, and the defendant demurred to it, in which demurrer the plaintiff joined. The court thereupon gave judgment for the plaintiff, for the principal sum of the note mentioned in the receipt, with interest thereon till 1843, and further interest on the aggregate amount, from the date of demand.

To the ruling and judgment of the court, the defendant excepted, and now assigns them as error.

McLester, for plaintiff in error.

1. In order to recover on the common counts, it is necessary to prove the money had been received. Fox v. Fisk, 6 How. (Miss.) R. 328; Baskin v. Sample, 6 Ala. 255. The proof here does not make a case within the influence of the principle decided in Dukes v. Leowie, 13 Ala. 459. That case decides, that *indebitatus assumpsit* will lie on an executed contract not under seal, although it was conditional. Here, the proof is defective, in failing to show the money was collected. It is necessary the proof should show every thing it would have been necessary to aver, had the count been special. Landrum v. Brookshire, 1 Stew. 252.

2. There is no cause of action shown by the receipt relied on, by the plaintiff below. The evidence, showing the name in the receipt was intended for the name of the plaintiff, should have been rejected, there being no averment of the fact in the declaration. The proof contradicts and varies the receipt, and was therefore illegally admitted.

3. But the whole evidence, taken together, does not make out a case which authorizes a judgment. And if it did, the plea of the statute of limitations is a bar to the recovery. The proof does not show that the note on McNeil is ever to fall due, and was dated 6th September, and due 25th December following, but in what year, does not appear. McNeil is shown to have been solvent, from the date of the receipt,

till the year 1843. And without any showing that the note was due within that time, because the sheriff had made money out of McNeil within that time, the court presumed that Boyd, who was not an attorney, collected the money on McNeil's note, whether it was due or not, and accordingly rendered judgment against him. And the court presumed, that the money was collected in 1843, and charged interest up to that time, and also charged interest from the demnad, thereby compounding the interest, and allowing defendant no sort of compensation for collecting.

4. The court had no right to render judgment, without a jury to assess the damages. Young v. Foster, 7 Por. 420; Carson v. State Bank, 4 Ala. 148. If the declaration had shown, by special averment, that the receipt was made to the plaintiff by the name of "Macom Gilchrist," the proof offered would have been good.

DOUGHERTY, contra.

1. On a demurrer to evidence, the court may draw every inference that a jury could reasonably draw. Gayle v. Cahawba and Marion R. R. Co. 8 Ala. 587.

2. The proof, explanatory of the christian name of the person to whom the receipt was given, was properly admitted. Jackson v. Stanby, 10 Johns. 133; Brown v. Gilman, 13 Mass. 158; Blakely v. Hampton, 3 McCord, 469; Hite v. The State, 9 Yerg. 357; Fish v. Hubbard, 21 Wend. 651.

3. The defendant was chargeable with interest, before demand. Wood v. Robins, 11 Mass. 504; Weeks v. Hasty, 13 ib. 218; Dodge v. Perkins, 9 Pick. 368; 9 Johns. 71; Rapelye v. Emory, 1 Dall. 349; Pope v. Barrett, 1 Mason, 117; Estate of Merrich, 1 Ashm. 305.

COLLIER, C. J.—It is insisted, that the receipt of the defendant below for McNeil's note, should not have been received as evidence, because it designates the party to whom it was given, as *Macom*, instead of *Malcolm* Gilchrist, and the mistake is not alleged in the declaration. The bill of exceptions shows it was proved, that the defendant admitted the christian name expressed in the receipt, was intended for

the plaintiff's name, and that he gave the receipt to the plaintiff.

The declaration is not founded upon the receipt, but merely embraces the common counts in assumpsit, and if the mistake may be explained by extrinsic proof, and the note was collected by the defendant, there was no necessity for alleging that *Macom* was intended for *Malcolm*. The frame of such a declaration, does not admit a specific allegation of the mistake, and if allowable to show it, proof may be adduced under the general count for money had and received. This is a proposition so well established by legal analogies, that it cannot be necessary to demonstrate it by argument, or a reference to authorities.

We will then inquire, whether the explanation of the mistake may be made by extrinsic evidence. It is impossible to lay down a rule, by which it can be determined, in all cases, whether parol evidence is admissible to show a contract, varying in terms from that which the parties have reduced to writing. We have so often had occasion to give to this doctrine an elaborate consideration, that it cannot be necessary to do more than notice the precise question before us. In Jackson v. Stanley, 10 Johns. Rep. 133, a patent for a military lot was granted to *David* Hungerford, a soldier, without any other words of description, to identify the patentee. In the action of ejectment, the lessors claimed the land as the heirs of *Daniel* Hungerford, a deceased soldier, alleged to be the patentee intended, and the defendant claimed under the heir of a person of the name of *David* Hungerford. Parol evidence was admitted to show, that the ancestor of the lessors was the real patentee intended, and that the name of David was inserted by mistake. So, in Brown v. Gilman et al. 13 Mass. Rep. 158, it was decided, that where the name of the party contracted with, is omitted in the writing, or a wrong name inserted by mistake, the omission may be supplied, or the correction made, by extrinsic evidence. See also Nicholas v. Krebs, ex'r, 11 Ala. Rep. 230. In Hellen, adm'r, v. Wideman, 10 Ala. Rep. 846, it was held, that the plaintiff might recover on a promissory note, payable to a person of the same surname, but whose christian name was different, if he made it appear, to the sat-

isfaction of the jury, that he was the payee intended. It was said by *Sir Lloyd Kenyon*, in Andrews v. Dobson, 1 Cox's Rep. 425, there were cases in which legacies were left to persons by nick-names, and evidence had been admitted to show, that the testator usually thus designated them. So, upon an indictment for stealing a bank note, alleged as payable at the "Mechanics' and Traders' Bank," it was allowed to prove by the cashier, that "Mech's" was intended as an abbreviation of the word "Mechanics," and upon this proof, the prosecutor was allowed to give in evidence a note payable at the "Mech's and Traders' Bank." See 3 Phil. on Ev. C. & H.'s Notes, 1372 to 1394; Blakely v. Hampton, 3 McC. Rep. 469. It is needless to add to these citations, or extend this opinion by commenting upon them. They are direct, and if the cases even in this court are followed, the circuit court had ample authority with the evidence identifying the plaintiff.

The receipt, it is true, when taken alone, and without the aid of other evidence, does not make out a case which entitled the plaintiff to a verdict. But when assisted by the testimony adduced, we think it might be intended that the defendant had collected the note. McNeil was solvent, and continued so four years after plaintiff received his note, and until within five years previous to the institution of the present suit. Conceding that the statute began to run immediately upon the defendant's receiving the money, though he was not put in default by demand, and still it can't be assumed, as the suit was brought within five years after McNeil became insolvent, that the act of limitations of six years operated a bar. All presumptions which a jury might legitimately draw against a party, should be made against one who demurs to the evidence, and thus withdraws his case from them. The application of this rule, which we have often reiterated, will not permit us to say, that the demurrer to the evidence was improperly overruled. Gayle v. C. & M. R. R. Co. 8 Ala. Rep. 587; Hardie v. Turner, 9 Ala. Rep. 110; P. & M. Bank of Mobile v. King, Upson & Co. ib. 279; Carson v. State Bank, 4 Ala. Rep. 148; Vere v. Lewis, 3 Term R. 182; Cort v. Birkbeck, Doug. Rep. 218; Mansel on Dem. 119, et seq.; 1 Stark. Ev. 530, 7th Am. ed.

The remaining question is, was it competent for the court, upon the facts demurred to, to assess the plaintiff's damages without the intervention of a jury. It has been held, where a person entrusted with the collection of money, retains and *converts* it to his own use, he is chargeable with interest from the time he should have paid it over. The People v. Gasherie, 9 Johns. Rep. 71. So, interest is allowed on the ground of a contract, express or implied, to pay it, or as damages for the breach of a contract, or the violation of a duty. Selleck v. French, 1 Conn. Rep. 32. Where one has received money for the use of another, which it was his duty to pay over, interest is recoverable for the time of the delay, but if the holder of money for another, is guilty of no neglect or delay, he will not be chargeable with interest. Thomas v. Weed, 14 Johns. Rep. 255; Commonwealth v. Lewis, 6 Binn. Rep. 266; Miller v. Beverlys, 4 Hen. & Munf. Rep. 415; State v. Blounts, 1 Hayw. Rep. 4; Hunt v. Jucks, ib. 173. But where there has been no misapplication of money, or no fraud or imposition in obtaining it, interest can only be recovered from the time of a demand made, or of the commencement of the action. Winthrop v. Carlton, 12 Mass. R. 4. If a defendant in an action for money had and received, has fraudulently obtained, or wrongfully detained the plaintiff's money, he is chargeable with interest from the time he so obtained or detained it; but where the defendant holds money, ready to be paid to the party who may be entitled to it, it seems he cannot be compelled to pay interest. Wood v. Robbins, 11 Mass. Rep. 504. In assumpsit against a consignee, who received goods under an engagement under a contract "to sell the same, and render a reasonable account," it was held, that interest was allowable in *case*, and also in actions *for money had and received*, from the time of a demand made, where the defendant has refused to account, or to make payment, or has converted the money to his own use. Mr. Justice Story said, "it may be admitted, that no interest was due until after a demand made, or until gross *laches* and delay of payment, contrary to the express or implied contract of the parties." Pope et al. v. Barrett, 1 Mason's Rep. 117.

In Dodge v. Perkins, 9 Pick. Rep. 368, it was decided,

that where an agent receives money, and neglects, for an unreasonable length of time, to inform his employer of it, he is liable for interest, from the time when he ought to have given information; that interest is allowable, where the law, by implication, makes it the duty of the party, to pay over the money to the owner, without a previous demand. The judge, who delivered the opinion of the court, said, "The great inquiry is, whether the party has done all that the law required of him in the particular case; whether acting on his own account, or as agent, executor, administrator, guardian or trustee for others. If he has, he is not accountable for interest; if he has not, he is accountable for it, as a compensation for the non-performance of his contract." Several cases are stated, where the law requires the party to pay over money, which he has acquired, immediately, without waiting for any demand or request of payment, and it is added, "The same rule should apply, where a party has acted as agent, to render a reasonable account, but has omitted to do so, for an unreasonable time. Interest should be calculated from the time of the breach of his undertaking. Crawford v. Willing, 1 Dall. Rep. 349, note." *Further*, "The argument that this was a friendly agency, undertaken without any expectation of compensation for services, we think, cannot make any sufficient excuse for the want of reasonable care in conducting it."

These rules, as deduced from the books, very satisfactorily show, that it connot be assumed from the demurrer, at what time the breach of the defendant's contract occurred, so as to charge him with interest, for any definite period. We must infer, that the defendant collected the note of McNeil, and that the statute does not bar an action, for the recovery of its amount against him; because a party might fairly have made such an inference. But we cannot presume that the collection was made on any certain day, or in any particular year; and even if this could be concluded from the evidence, there is no *data*, of which the time of the defendant's default, in not giving notice to the plaintiff, or of his failure to pay over the money to him, can be predicated. The most we can say is, that the evidence indicates his liability to the plaintiff, at the time the suit was instituted, or that a jury would have been authorised to intend it.

In this predicament of the cause the court could not admeasure the quantum of interest, with which the defendant was legally chargeable. True, upon the evidence before them, the jury might have contingently assessed the damages, for which the judgment should be rendered upon the judgment, on demurrer, being in favor of the plaintiff; and perhaps they would have been warranted in calculating interest, from the maturity of the note down to the time of the trial. It may be, that from the time of the failure to pay over on demand, in the absence of evidence to explain or excuse the refusal, a conversion simultaneously with the receipt of the money, would be a reasonable inference. But these questions need not, and perhaps cannot be considered, in the condition in which the case is presented.

In Young v. Foster, 7 Por. Rep. 420, it was said, that when upon overruling a demurrer, by the defendant, to the evidence, the court have no power to assess the plaintiff's damages, "The ancient, and perhaps the most correct course, is to direct the jury to assess the damages at the time the demurrer is taken, to be imposed in the event the demurrer is overruled;" but it is also proper, where this has been omitted, to impannel a jury after the decision on the demurrer, to inquire what damages the plaintiff has sustained. The former course is however, commended by its convenience, to mention no other consideration—the demurrer may be retained *sub judice* for some time, during which the witnesses may disperse, or some of them die, and its ultimate decision be thus delayed, and perhaps justice defeated. See also Mansel on Dem. 124; 1 Stark. on Ev. 530, and citations in notes, 7th Am. Ed. It may be proper to add, that the evidence recited in the demurrer, cannot be read to the jury, to whom the inquiry of damages may be submitted. This point was directly so ruled in the case cited from 7th Porter.

The decision upon the demurrer to the evidence being correct, it will not be disturbed; but the ascertainment of damages by the court being unauthorzied, the judgment is thus far reversed, and the cause remanded, that they may be assessed, in the manner we have indicated would be proper.

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3. The proper course for a plaintiff to pursue, where the defendant pleads at the same time in abatement, and in bar, is to move to strike out the former, or to treat it as a nullity. *Ib.* 675

ACTION.

1. M, purchased a carriage of B, and for the payment of 150 dollars, part of the price, drew an order in favor of B, as follows: "Mr McGuire will please pay, when collected, of fees now due, as orphans court fees, one hundred and fifty dollars, and I am to be responsable for interest on this order, until paid," which was accepted by McGuire. B, at the same time, in writing, acknowledged the receipt of the order, and other claims, in payment of the carriage. It was proved that more than $150 was due M, in fees, when the order was drawn, but that McGuire did not collect them, but turned the fees, and fee docket, over to one Blount, his successor in the office of county court clerk, of which M was judge. Held, that in the absence of fraud, or mistake in giving the order, and executing the receipt, and there being no proof that the fees were not due, and could not be realized, or that M had interfered to prevent the collection of the fees, B could not maintain an action against M, upon the original consideration. *Moore* v. *Briggs*, 24
2. *A verbal promise*, made to an agent, to pay the amount of an execution, in favor of the principal, which has been levied on property of the defendant, in consideration that the agent will release the levy—does not authorize an action against the promissor, in the name of the agent. *Nabors* v. *Shippey*, 293
3. Where the note of a third person is indorsed, and delivered in absolute payment of a pre-existing debt, an action cannot be maintained on the

ACTION—CONTINUED.

original debt, but the remedy of the creditor is on the indorsement alone, unless the transfer of the note is affected with fraud, or misrepresentation as to the solvency of the maker. *Fulford* v. *Johnson, Hendon & Co.* 386

4. Where a statute creates a liability to pay money, and prescribes no particular form of action for its recovery, an action of debt is the appropriate remedy. *Strange* v. *Powell,* 452

5. If D., on a good consideration, promises W. to pay a sum of money on a note made by W. and C. as his security, to a third party, C. has no right of action against D., upon the failure of the latter to perform his promise to W. *Carter* v. *Darby,* 696

See Consideration, 3.

ADVANCEMENT.

1. When advancements have been made to distributees of an estate, in the life time of the decedent, and, on distribution, such advancements are brought into hotchpot, the distributive share of the widow is not increased thereby, but must be carved *alone* out of the estate, of which the decedent died possessed, without reference to the advancements. *Andrews, adm'r,* v. *Hall et al.* 86

2. The widow of a decedent is a competent witness in a controversy, involving the amount of advancements for which each of the several distributees is accountable. *Ib.* 86

ADVERSE POSSESSION.

1. The possession of one tenant in common may become antagonistic, and exclusive, of a co-tenant, and will become so by an unequivocal, and notorious denial of the right of the co-tenant. *Abercrombie* v. *Baldwin et als.* 363

2. It is not indispensable to an adverse possession, that the title of the occupant be such as would be recognized. If it be colorable, and asserted *bona fide*, it will be sufficient; and if he held adversely to his co-tenant, those claiming under him will also hold adversely. *Ib.* 363

AMENDMENT.

1. The circuit court has no power to direct an amendment of a judgment *nunc pro tunc*, after such judgment has been affirmed on certificate in the supreme court; and a writ of error will lie to this court, upon the judgment of the court ordering such amendment. *Stephens et al.* v. *Norris, Stodder & Co.,* 79

2. An amendment of an error in the original judgment, cannot be made in the supreme court. *Ib.* 79

3. A judgment or decree cannot be amended, upon evidence *dehors* the record. *Bondurant, adm'r,* v. *Thompson's distributees,* 202

APPEALS AND CERTIORARI.

1. A judge of the circuit court in this state has the power to grant writs of *certiorari*, returnable to said court, to correct the errors of the commissioners' court of roads and revenue in the establishment of a new road, and take cognizance thereof. *Com's of Talladega Co.* v. *Thompson*, 134
2. In the trial of an appeal, in the circuit or county court, from a judgment of a justice of the peace, the appellate court is required, by the statute, to try the same, according to the justice and equity of the case, without regard to defects in the warrant, *capias*, summons, or other proceeding of the justice, before whom it was originally tried. *Hart* v. *Turk*, 675
3. On an appeal from a justice of the peace, the amount of the recovery, and not the amount of damages, laid in the declaration, is to be looked to, to show the jurisdiction of the court. *Ib.* 675

ARBITRATION AND AWARD.

1. An award must conform to the submission, under which it is made. *Reynolds* v. *Reynolds*, 398
2. If arbitrators transcend their authority, the award, *pro tanto*, will be void, but it will be good as to the residue, unless that which is void so affects the merits of the submission, that it cannot, without injustice, be separated from the balance. *Ib.* 398
3. Every reasonable presumption will be made in favor of an award, and if, by the application of this principle, it can be brought within the submission, and is, in other respects, unobjectionable, it will be sustained. *Ib.* 398
4. An award is not objectionable for want of mutuality, which directs the payment of a sum of money by one party to the other, without prescribing any act to be done by the latter. *Ib.* 398
5. Where, under the submission of a cause, pending in court, to recover the amount of a bill single for $1,000, due the 1st of March, 1846, wherein I R is plaintiff, and W R is defendant, and in which the defendant has pleaded failure of consideration and fraud, the arbitrators award, "that the said W R, defendant, shall have and hold, the right, title and interest, in, and to the negro boy, Nelson, and that in consideration of the same, the note for $1,000, payable the 1st day of March, 1846, drawn in favor of I R, and signed by W R, be paid, and that W R, the defendant, pay the costs of the suit:" Held, 1. That the fair inference from the pleadings, and the language of the award, is, that the slave was the consideration of the bill single, and that the arbitrators merely decided, that neither of the defences, set up by the defendant, was valid. 2. That the award is not void for uncertainty, either in not naming the person to whom the money is to be paid, or in not specifying the amount of costs. 3. That in determining, that the defendant should pay the bill single, the arbitrators must be understood, as meaning, that he should pay it, according to its legal effect, with interest. *Ib.* 398

ASSIGNMENTS.

1. Each partner possesses an equal, and general power, in behalf of the firm, to pledge, exchange, or otherwise dispose of the partnership effects, for any, and all purposes within the scope of the partnership. One partner may assign property for the benefit of one, of several, or of all the joint creditors. Whether one partner can make a general assignment, of *all* the partnership effects, *quere*. *Cullum* v. *Bloodgood, Ford et als.* 34
2. Where an assignment, made by a debtor of all his estate, to trustees and their successors, for the benefit of creditors, reserves to the assignor the right to substitute a trustee, in the event of the death, or refusal to act, of those appointed, and contemplates the exclusive management by the trustees of the interests conveyed, and one of the trustees, being also a *cestui que trust*, dies, pending a suit against the trustees, it is not necessary to revive the suit against the personal representative of the deceased trustee. *Mobile and C. P. R. R. Co.* v. *Talman and Ralstons*, 472
3. Where several notes, secured by deed of trust, are assigned by the payee, to different persons, at different times, the assignment of each note is, *pro tanto*, an assignment of the security; and the liens of the several assignees are to be preferred, according to the priority of the assignments, without reference to the maturity of the notes. *Nelson & Hatch* v. *Dunn et als.* 502
4. A voluntary assignment, by a debtor, to a trustee, for the security of debts, is invalid to pass the title of the property to the trustee, until it is assented to, either *expressly or impliedly*, by the creditors, whose debts it is intended to secure. *Ib.* 502
5. If a creditor, for whose benefit, an assignment is made, dissents from it, and subsequently, by a new and distinct arrangement with the assignor, acquires the right to dispose of the subject of the trust, his title will vest from the date of such arrangement, and cannot be extended back to the date of the assignment, so as to overreach an intermediate equity. *Ib.* 502

ASSUMPSIT.

1. A recovery may be had for work and labor, when the defendant has accepted the work, although it does not amount to a complete performance of the special contract. *Merriweather, adm'r*, v. *Taylor*, 735
2. When the suit is on the contract, the plaintiff must prove the work done, according to the agreement, and cannot recover by proving the use, and acceptance of the work, by the defendant. But when the suit is on a note, executed after the work was done, proof by the defendant that the work was not completed according to the contract, will merely reduce the recovery *pro tanto*, but the plaintiff will be entitled to recover, as much as the work was reasonably worth. *Ib.* 735

ATTACHMENT.

1. In an action for vexatiously sueing out an attachment, it is competent for the defendant to prove, in mitigation of damages, that the plaintiff was

ATTACHMENT—CONTINUED.

indebted to him in Georgia, and that he ranaway from that State with his property to avoid the payment of his debts. *Melton* v. *Troutman*, 535

2. Where the defendant in an attachment suit, brings an action vs. the plaintiff for maliciously suing out the attachment, and offers in evidence, in connexion with the answers of such plaintiff, to interrogatories filed in said suit, under the statute, the interrogatories and *his own affidavit* therein, for the purpose of explaining the answers, without pointing out the necessity of any explanation, or the particular part relied upon for the purpose, the court may properly reject the whole. *Ib.* 535

3. An attachment returnable before a justice of the peace, cannot be quashed in the circuit court, to which an appeal is taken, from the judgment of the magistrate, because the attachment was not executed in the county in which it issued; the objection not having been taken before the justice. *Slaton* v. *Apperson*, 721

BANK STATE, AND BRANCHES.

1. All debts due the bank, after maturity, carry interest, at the rate of eight *per cent. per annum.* *Br. Bank Mobile* v. *Strother*, 51

2. The banks of this state, cannot discount notes, or bills, at the rate of eight *per cent. per annum*, having a longer period to run than twelve months: nor can they extend a debt due them, and charge interest by way of annual discount, in advance. They may discount a bill, or note, having more than twelve months to run, by ascertaining the present worth of the note, or bill, at eight *per cent.*, for the time it has to run. *Ib.* 51

3. A discount of a note, made by calculating the interest for one year, and multiplying this sum by the number of years the note has to run, and deducting the amount thus ascertained, from the amount of the note, is illegal, whether made by a bank, or by an individual. *Ib.* 51

4. The agents of the State Bank and its branches, appointed under the statute, possess the same powers in executing process in favor of the bank, conferred on sheriffs, and are bound to observe the same rules. *Morgan* v. *Doe ex dem. Ramsey*, 190

5. In a suit, by the Bank of the State of Alabama, or any of its branches, on a joint and several promissory note, or bill of exchange, judgment may be rendered, under the statute of 1840, requiring all the parties to be sued in the same action, against any defendant, whom the jury shall by their verdict find liable on it, although other defendants may make a successful defence, and defeat a recovery against them. *Bussey* v. *Branch Bank at Montgomery*, 216

6. An agent, appointed by the Bank of the State of Alabama, or one of its branches, under the statute of 1843, to execute the process, is the sheriff of the bank, and is invested with the power and authority to perform the duties of his office by deputy. *Draine* v *Smelser & Henderson*, 423

BANK, STATE, &c.—CONTINUED.

7. Under the joint resolution of the general assembly of the 31st December, 1842, the Bank of the State of Alabama, and its branches, have the power to purchase real estate sold under executions in their favor. *Martin* v. *Br. Bank at Decatur*, 587

BANKRUPT, AND ASSIGNEE OF.

1. The bankrupt act of 1841, does not restrain a creditor of one, who has availed himself of its benefits, from suing on his demand, but merely arms the bankrupt with a complete defence to the suit, until it is shown that his certificate was obtained by fraud, or that the debt comes within some one of the exceptions, mentioned in the act. *Cogburn and Powell* v. *Spence and Elliott*, 549
2. If a creditor of one, who has taken the benefit of the bankrupt act, has reduced his debt to judgment, before the bankrupt obtains his certificate of final discharge, he will not be compelled to bring a new suit on the judgment, but may cause execution to issue thereon, subject to be set aside or quashed on the application of the bankrupt. *Ib.* 549
3. An execution, issued on a judgment, which has been rendered against a bankrupt, before he obtains his certificate of final discharge, is not void, but voidable only, at the instance of the bankrupt. *Ib.* 549
4. A decree in bankruptcy, will not protect the surety of a guardian of a minor, on his official bond, against a statute judgment obtained against him as such surety, by the return of no property to an execution against his principal, though made after he obtained his decree in bankruptcy. *Turner and wife* v. *Esselman*, 690
5. An effort being made to establish, that G. had obtained a decree in bankruptcy, fraudulently, G. offered to prove, that six months before the institution of the proceedings in bankruptcy, one Shannon applied to him to borrow money; that G. informed him he had none of his own, but had some belonging to one Simmons, which he had no doubt Shannon could get, if Simmons did not want it. At the termination of this conversation, Simmons rode up, and G. handed him a roll of money, supposed to be $100: held, that this testimony was properly rejected. *Gilbert* v. *Bradford*, 769
6. The creditor proved, that G., the year he applied to be declared a bankrupt, had hauled with a dray, and team, managed by a slave named H., a large quantity of wood, which he sold for a considerable sum of money. To rebut this, G. offered to prove, that one S., at the time said hauling was done, had declared in his, G.'s presence, that the hauling was done on his, S.'s account: held, that the declarations of S. were properly excluded.—*Ib.* 770
7. The creditor having proved, that one S., a few years after the bankruptcy, hired two slaves of L. G., who represented himself as the agent of the bankrupt in hiring the slaves, and that S. subsequently paid a part of the

BANKRUPT, &c.—CONTINUED.

hire, as hire to the bankrupt, and the residue to another person: held, that this testimony was competent, there being no specific objection to that portion of it, which established the agency of L. G. *Ib.* 770

8. When a bankrupt's discharge is impugned for fraud, the creditor may prove the possession of the property by the bankrupt four years after the bankruptcy, and the jury must determine whether the property was fairly acquired, or by a fraudulent concealment of his effects. *Ib.* 770

BASTARDY, PROCEEDINGS IN.

1. A judgment, in a bastardy proceeding, will not be reversed, because the judgment entry omits to state in whose favor the judgment is rendered. The statute determines, with unerring certainty, who is the plaintiff. *Yarborough* v. *Judge of Shelby Co.*, 556

2. Where a defendant in a bastardy proceeding is in custody, when a judgment is rendered against him, it is not erroneous, for the court to order, that he remain in custody, until he gives the bond required by the statute. *Ib.* 556

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. Where the holder declares upon one of a set of exchange, it is not necessary to account for the non-production of the rest; any ground of defence which may arise in reference to another of the set, it devolves on the defendant to make. *Hazzard* v. *Shelton*, 62

2. An allegation in a declaration, "that the notary, *at*, *&c.*, *aforesaid*, made diligent search, and inquiry for the said acceptor," is a sufficient allegation, that inquiry and search was made in Mobile, it having been previously alleged, that the bill was directed to Charles Byram, Esq., Mobile. *Ib.* 62

3. Where a notary public fails to give the indorser of a negotiable note the notice requisite to charge him, the statute of limitations of six years (Clay's Dig. 329, § 90) commences to run, in favor of the sureties on his official bond, from the date of the default, and not from the time of its discovery, or the ascertainment of the damage, by the injured party. *Governor* v. *Gordon*, 72

4. In a suit, by the Bank of the State of Alabama, or any of its branches, on a joint and several promissory note, or bill of exchange, judgment may be rendered, under the statute of 1840, requiring all the parties to be sued in the same action, against any defendant, whom the jury shall by their verdict find liable on it, although other defendants may make a successful defence, and defeat a recovery against them. *Bussey* v. *Branch Bank at Montgomery*, 216

5. A bill of exchange, payable *at sight*, is entitled to days of grace, and a demand of payment, and notice to the drawer, without a previous presentation for acceptance, are insufficient to charge him. *Hart* v. *Smith*, 807

BILLS OF EXCHANGE, &c.—CONTINUED.

6. When a bill of exchange has been accepted by two persons, as partners, who at the maturity of the bill, have dissolved their partnership, and are also absent from Mobile, the place of their residence, a demand of payment made of an agent of one of the partners, is sufficient. *Brown* v. *Turner*, 832

See Gaming, 3, 4.

CHANCERY.

1. A court of chancery has jurisdiction to entertain a bill for a discovery of assets, which an administratrix has not returned in her inventory. *Hunley et al.* v. *Hunley*, 91
2. Where a father went to live with his only son, who afterwards worked their slaves on the plantation of the son in consideration of which the son supported the father, after the death of the father, the son should be charged with the reasonable hire of the slaves, if he kept and employed them. *Ib.* 91
3. When a patent issues to one, reserving the title of all others, whether legal, or equitable, derived from W. & Co., a court of equity will subject the legal title to a superior equitable title derived from W. & Co. *Haden* v. *Ware*, 149
4. To authorize a court of equity to interfere, and grant relief for a mistake of law, the mistake must be so gross, and palpable, as to superinduce the belief, that some undue advantage was taken of the party, from imbecility of mind, or the exercise of improper influence. *Ib.* 149
5. Where the specific execution of a contract would be decreed, between the original parties to it, it will also be decreed between the parties claiming under them by assignment, or in privity of estate, unless some new equity intervenes, which is insisted on in bar of the specific execution. *McMorris* v. *Crawford et al.* 271
6. Where a bill filed by T., and A. and G. R., against the M. and C. P. R. R. Co. and *others*, to foreclose a mortgage executed by said Co. to T. on a certain lot of land, and an equitable mortgage, executed by said Co. in Philadelphia, to A. and G. R., on "the real and personal estate" of said company, to secure debts due by it to T., and A. and G. R., respectively, after describing three parcels of land owned by said company at the time of the execution of said equitable mortgage, avers, "that the company was also possessed of large quantities of iron of various descriptions, steam engines, cars, and various other chattels, which were pledged by said contract," to A. and G. R: "that M. D. E. had converted the said chattels, or a large portion of them, to his own use, by selling the same, and receiving the proceeds thereof:" and the register, under a reference by the chancellor, reports a certain sum due to T. on the 1st January, 1847, and another sum due to A. and G. R., on the 31st December, 1843, subject

CHANCERY—CONTINUED.

to two credits of subsequent dates, and that these sums must draw interest to the 10th April, 1847, the time of the report: and the chancellor thereupon orders and decrees, that the "defendants" pay the amounts so reported, into the hands of the register, by the first day of May next thereafter, and on their failure to do so, the register shall proceed "to sell the property described in complainants' bill, and mortgages and exhibits, or so much thereof as shall be necessary to satisfy the complainants' debts, and interest, and costs of suit," &c. The decree is erroneous—1. Because it is incomplete. 2. For want of certainty. *Mobile and C. P. R. R. Co.* v. *Talman and Ralstons*, 473

7. If a party having a defence, which is available, either in a court of law, or a court of equity, elects to assert it in the former, and fails, he is concluded thereby from insisting on it, in the latter tribunal, unless he can show some special ground for its interposition, such as, fraud, or accident, unmixed with negligence on his part, by which it was rendered unavailing: but an unsuccessful attempt to assert, in a court of law, a defence purely equitable, is not an estoppel in a court of equity. *Nelson and Hatch* v. *Dunn et als.*, 502

8. It is a general rule, that where a court of law has first taken cognizance of a matter, of concurrent jurisdiction, a court of equity cannot interfere: but if the plaintiff at law files his bill, and submits the matter in controversy to a court of chancery, such court, the defendant not objecting, will retain jurisdiction of it, and proceed to do full justice between the parties. *Ib.* 502

9. If a complainant in a bill admits an indebtedness by him to the defendant, a court of equity will not become active in his behalf, unless he pays, or offers to pay it, as the court may direct; but in a bill for an account, it is not necessary, that the complainant should offer to pay whatever balance may be found against him. *Ib.* 502

10. Where N. and H. purchased from A. H. a plantation and slaves, and executed to him their notes, and a deed of trust, on the property, to secure their payment, and A. H. assigns a part of said notes to D., in trust, to secure certain debts, due by A. H. to sundry creditors, and N. becomes the *bona fide* holder of a portion of the debts, to secure which said notes of N. & H. were assigned by A. H. to D., and D. sues N. & H. on said notes, a court of chancery, on a bill, filed by N. & H. against D., will restrain him from collecting out of them, such portion of said notes, as when collected, D. would have to pay over to N. *Ib.* 502

11. If N. & H. have *two* funds, as security for their debt, D. having an interest in *one only*, can compel N. & H. in equity, to resort to the *other* fund *first*, if it be necessary to do so, for the satisfaction of the debts of *both*.—*Ib.* 502

12. A court of equity cannot interpose by injunction, to restrain a plaintiff,

CHANCERY—CONTINUED.

who has obtained judgment, on a writ of forcible entry and detainer, from having restitution of the possession, notwithstanding he is insolvent, and the complainant holds the undisputed legal title to the land. *Hamilton et al.* v. *Adams*, 596

13. When a woman marries, after the execution of a mortgage, by her husband, on land, a court of chancery, whilst it makes the security available to the mortgagee will take care that the interest of the widow is not affected, more than is necessary to secure the payment of the debt. *Fry* v. *Mer. Ins. Co.*, 810

See Husband and Wife, 6, 7.

See Orphans' Court, 6.

See Partners and Partnership, 1, 2.

CHOSE IN ACTION.

1. The transferror of a *chose in action*, is an incompetent witness to establish the claim. *Clifton et al.* v. *Sharpe*, 618

CONSTITUTIONAL LAW.

1. The act of February 18th, 1848, "prescribing and regulating the fees of the judges, and clerks of the county courts of this state," operates, as well on the judges in office at the time of its passage, as on those subsequently appointed. *Benford* v. *Gibson*, 521
2. Appointments to public offices, created by a state legislature, are not considered contracts, in the sense of that term, as used in the 10th section, of the 1st article of the constitution of the United States. *Ib.* 521
3. The legislature of a state may increase or diminish the compensation, allowed its public officers, without any other restraint, than that imposed by its own constitution. *Ib.* 521
4. The act of February 18th, 1848, "prescribing and regulating the fees of the judges, and clerks of the county courts of this state," does not violate any provision of the constitution of this state, or of the United States.—*Ib.* 521
5. The authority conferred, by the 13th section of the act of the 6th March, 1848, "to regulate permanently the 16th section fund" is the exercise of a power beyond the functions of legislation, and is of consequence inoperative. *Hardy et als.* v. *Br. Bank at Montgomery*, 723

CONTEMPT.

1. Whether, if one person uses the name of another, without his knowledge or consent, in a suit, in the subject matter of which, he has not, and never had any interest, such person would not be liable to attachment, as for a contempt—*quere*. *Scott* v. *John*, 566

CONTRACT AND AGREEMENT.

1. Where, by a law of the University of Alabama, duly published, its tutors

CONTRACT AND AGREEMENT—CONTINUED.

are required to hold their offices for the term of two years, unless permitted by the executive committee to resign, and by one of its ordinances, their salaries are fixed at $1,000 per annum, the election of a tutor, and his acceptance of the office, whilst such law and ordinance are in force, constitute a contract between him and the University, and the latter cannot, within the two years, reduce this salary, without his consent. *University* v. *Walden*, 655

See Consideration, 4.

CONSIDERATION.

1. A recital in an assignment of a land certificate, that it was transferred for a valuable consideration, is not evidence against one, who was a creditor of the assignor, at the time. The burthen of proving the consideration is cast upon the grantee. *Falkner* v. *Leith & Jones*, 9
2. If McG., having purchased, at execution sale, the equity of redemption of F. in a tract of land, which F. had previously mortgaged to G. as security for a debt, agrees with F. to divide with him the rents of the land, so long as he retains the control of it, in consideration, that F. will defend a bill of foreclosure, filed by the administrator of G., and furnish proof, that will reduce the debt of G. to one half the amount claimed, and, in pursuance thereof, F. files his answer to the bill, but fails to furnish any proof whatever, and a decree is rendered for the full amount, it is such a failure of consideration, on the part of F., as discharges McG. from his contract.—*McGehee* v. *Walke*, 183
3. In determining, whether an agreement by a creditor to accept from his debtor a less sum, than he owes, in full satisfaction of the debt, is without consideration, the insolvency of the debtor, at the time, can have no influence. His *obligation* to pay is not impaired by his insolvency. *Pearson & Fant* v. *Thomason*, 700
4. H. desiring to rent a store for the year, obtains from B. & S., the respective owners of two, the refusal of them, at the prices fixed upon each, viz: B's at $1,500, and S's at $1,200; McK. & Bro. desiring also to rent one of the same stores, apply to B. & S. respectively, for that purpose, each of whom informs them of his promise to H., and declines renting to them: McK. & Bro. then call upon H., who consents to waive, in their favor, the privilege accorded to him by S., on the condition, that they will pay him, $150, it being one half the difference between the prices of the two stores, to which they agree: H. thereupon rents, and occupies for the year, the store of B., and McK. & Bro. rent, and occupy for the same term, the store of S.: *Held*, that the contract of McK. & Bro. is founded on a sufficient consideration to support an action thereon, instituted against them, by H. *McKeen & Bro.* v. *Harwood*, 792

See Marriage and Marriage Settlement, 3.

See Pleading, 2.

CORPORATION.

1. An insolvent corporation, cannot, by resolution or otherwise, give away the effects belonging to it, to the prejudice of creditors; and any arrangement entered into between the corporation and its stockholders, with the view of defeating the claims of creditors, by which the stockholders were allowed to purchase up depreciated and repudiated claims, and thus to extinguish their indebtedness for stock, would be void, both at law and in equity. But a company having various debtors, as well as creditors, may provide, that if the evidence of the debts due by it are obtained by its debtors, and filed for cancellation, the one shall extinguish the other.—*Goodwin et al.* v. *McGehee et al.* 233
2. A corporation, like an individual person, may cancel a debt due it, by setting off a debt from the corporation to the same person; whether the debt be due from a stockholder for stock, or on any other account. *Ib.* 232
3. A corporation is capable of making every species of deed, and, though by special permission in its charter, it is empowered to mortgage its effects for a *particular* purpose, this will not take away, or abridge, its *general* power to execute mortgages for the benefit of creditors. *Mobile and C. P. R. R. Co.* v. *Talman and Ralstons,* 472

COSTS.

1. If a person, not a party to the record, causes an execution to be issued, in the name of a dead plaintiff, and levied on property, to which a claim is interposed, he cannot be compelled, by process of attachment, to pay the costs of the claim suit, it not appearing, that he was a gratuitous volunteer, or that he was aware, at the time, of the plaintiff's death. In such a case, the liability of the party must be fixed by suit in the ordinary mode. *Scott* v. *John,* 566

See Divorce, 5.

See Practice in Chancery, 18.

COURT, SUPREME.

1. An amendment of an error in the original judgment, cannot be made in the supreme court. *Stephens et al.* v. *Norris, Stodder & Co.,* 79
2. The decision of the supreme court made in a cause, is the law of that particular case. *Goodwin et al.* v. *McGehee,* 232

COURT, CHARGE OF.

1. In a suit against two, the admissions of one defendant are competent testimony. If the co-defendant desires to avoid the effect which such admission may have upon him, he should ask a charge of the court. *Falkner* v. *Leith & Jones,* 9
2. Where there is no conflict in the testimony, it is not error in the primary court, to charge the jury, that under the proofs, the defence set up is, or is not sustained. *Gillespie et al.* v. *Battle,* 276

COURT, CHARGE OF—CONTINUED.

3. Where, in action of trespass *vi et armis* against J and A, there are any circumstances detailed in evidence, from which the jury might reasonably infer the participation of J in the trespass, it is not error to refuse to charge the jury, that they ought to find the defendant J not guilty. *Jones & Abernathy* v. *Welch*, 306
4. In an action of trespass against an officer, and the plaintiff in an execution, for illegally selling property under it, it is not error to instruct the jury, that they may look to the facts, that the latter was the plaintiff in the execution, and that he had just before the sale, delivered to the officer a blank paper, with his signature thereon, as circumstances, in connection with the other proof, tending to show, that the sale was made under his directions. *Ib.* 306
5. It is not error to charge the jury, "that if they believed, from the testimony, that the defendant played cards at the house mentioned by the witness, and that it was, at the time, a house to which people did resort, then the defendant was guilty." *Cameron* v. *The State*, 383
6. The genuineness of a receipt being in issue, the court charged the jury, "that if the evidence, although it preponderated in favor of the receipt being genuine, still, if upon a fair and full examination of it, their minds were left in a state of doubt, and uncertainty, as to its being genuine, they should find in favor of the plaintiff upon that point." Held, that this charge could not be supported, as the jury were authorized to infer, that *demonstrative* evidence was required, and that *moral* evidence was insufficient. *Hopper, adm'r*, v. *Ashley*, 457
7. Where illegal testimony has been admitted by the court, nothing short of a direct, and unequivocal charge to the jury, that they must disregard the illegal proof, can cure the error of its admission. *Carlisle* v. *Hunley*, 623
8. When instructions to the jury actually given, are excepted to as mistaking the law, no part of the testimony need be stated, to authorize the appellate court to revise the case, upon the bill of exceptions. *Tharp* v. *State*, 749

CRIMINAL CASES AND PROCEEDINGS IN.

1. Upon the indictment of a slave, for the murder of a white man, a finding by the jury, that the prisoner is "guilty of voluntary manslaughter," is sufficient to authorize the court, to sentence the slave to the punishment of death. *State* v. *Stephen*, 534
2. Upon the examination of one charged with a criminal offence, the testimony of a witness was reduced to writing, *or so much thereof*, as the committing magistrate *considered material*, the accused being present, and cross-examining the witness. The witness died, and the minutes of the examination being lost, and not being found, either in the office of the magistrate, or in the court where the indictment was pending: held, that as only so much of the testimony, as the magistrate *deemed material*, had been committed to writing, he could not be called on to prove the sub-

CRIMINAL CASES, &c.—CONTINUED.

stance of the testimony thus reduced to writing, without also proving what was omitted to be inserted. *Quere*: was there a sufficient predicate laid for the introduction of the secondary evidence, without proving, that the magistrate had returned the paper to the court, where the indictment was found? *Tharp* v. *State*, 749

3. When it is necessary to prove a guilty knowledge on the part of the accused, it is sometimes allowable to give evidence of other offences committed by him, though not charged in the indictment, as in the case of forgery, and uttering counterfeit coin. *Ib.* 749

See Indictment, 1, 2.

See Recognizance, 1, 2, 3, 4, 5.

CROSS BILL.

1. A cross bill, formal in other respects, but which omits the prayer, that it be allowed as such, and heard with the original bill, is amendable, and on an application to the chancellor, in vacation, to dissolve the injunction, should be regarded by him, *pro hac vice*, as amended. Such bills are treated with greater indulgence than original bills. *Nelson and Hatch* v. *Dunn et als.* 501

2. A cross bill is a mode of defence, and is dependent on the original bill, forming with it, but one suit, and, although its allegations must relate to the subject matter, it is not restricted to the issues, of the original bill. *Ib.* 501

3. It is not necessary, that a cross bill should alledge any ground of equity, as against the complainant in the original bill, to give the court jurisdiction. *Ib.* 501

4. A plaintiff in a cross bill is not allowed to contradict his answer to the original bill: if he has made a mistake as to the facts in his answer, the only mode of correcting it, is by application to the court for leave to amend it, or to file a supplemental answer, and not by the exhibition of a cross bill. *Graham et al.* v. *Tankersley*, 634

DAMAGES.

See Warranty, 2, 3.

DEEDS AND BONDS.

1. An instrument, with a scroll attached to the name of each of the signers thereof, having the word "seal" written within, and in which the parties "bind and oblige themselves," &c., and use the terms, "the condition of the above obligation," &c., and which provides, that, upon performance of the condition, "the above obligution to be void," imports on its face to be under seal, and will be taken, deemed and held, to be a sealed instrument. *Lindsay and Atkinson* v. *The State*, 43

2. Where a deed is found in the hands of the grantee, and the possession of

DEEDS AND BONDS—CONTINUED.

the lands conveyed by it, is quietly enjoyed by him, and those claiming under him, for more than twelve years, the presumption of law is, that there was a due delivery of the deed. *McMorris* v. *Crawford*, 271

DEEDS OF TRUST.

1. D, in 1841, with the assent of his creditors, executed to H a deed of trust for their benefit, by the terms of which H is required to sell the property, for one third cash, and on a credit of one and two years, for the balance. H sells it on a credit to the first of January, 1843, for an amount more than sufficient to pay all the debts, and on the expiration of the credit, without the consent of the creditors, extends the time of payment from five to seven years. H then made a settlement with all the creditors, except S, and on the 1st July, 1846, upon an accounting with S, executed to him an instrument specifying the amount due him from the trust fund up to that date. Held—1. That S can maintain an action of assumpsit against H, for money had and received to his use. 2. That proof of payment made by H to S, prior to the 1st July, 1846, on his debt, unaccompanied with any evidence tending to show a mistake in the settlement made on that day between H and S, was properly rejected. 3. That the undertaking of H, is not to answer for the debt or default of another, but to discharge a debt out of funds placed in his hands for that purpose, by the debtor.—*Hughes* v. *Stringfellow*, 324
2. Where C. executes a deed of trust to indemnify K. against loss, as his security on a note, with power of sale, whenever a judgment on the note is rendered against K., and K. before the maturity of the note purchases, or pays it, a court of equity will enforce the deed for the benfit of K., to the extent of his disbursement in the purchase or payment of the note.—*Graham et als.* v. *King*, 563
3. Where two successive deeds of trust are executed for the same property, to the same trustee, but for the benefit of different *cestui que trusts*, and the trustee sells it under the *junior* lien, the purchaser acquires by his purchase the equity of redemption of the grantor in the property, and it is error in the chancellor, on a bill filed to enforce the prior lien to decree the title of the purchaser null and void. *Ib.* 563
4. P. C. H. executes a deed of trust to M. H. H. for a number of slaves, to protect him from liability as his security on a note held by the bank—some of the slaves are sold by the sheriff under older liens, and M. H. H. purchased them—the remainder are sold, for the purpose of paying said note, by the register, and under a decree in chancery, rendered on a bill filed by M. H. H. against P. C. H. and A. The bank assents that the register's sale may be on a credit, the purchaser giving notes wirh approved security—C. became the purchaser, and gave M., S., C., and S. as securities, to whom M. H. H. and C. executed a deed of trust on all the slaves, as well those sold by the sheriff, as those sold by the register, for their in-

DEEDS OF TRUST—CONTINUED.

demnity, and in it, the previous deed from P. C. H. to M. H. H. is recited. The bank afterwards procures an execution in its favor against P. C. H. founded on another and distinct debt, to be levied on the slaves sold by the sheriff, and M. H. H. interposes a claim. Held: 1st. That the chancery proceedings are not evidence against the bank. 2d. That the assent of the bank to a sale by a register on a credit, did not make it a party to the chancery proceedings, nor can it affect its right to subject the slaves levied on, to its execution. 3d. That the recital of the deed from P. C. H. to M. H. H. in the deed from M. H. H. and C. to M., S., C. and S., is not evidence to show title in M. H. H., but that if he relied on his deed from P. C. H. he should have proved not only its execution, but the *consideration thereof*, by legal evidence. 4th. That neither the chancery proceedings, the action of the bank at the register's sale, nor the deed to M., S., C. and S. separately or collectively, could estop the bank from contesting the title of M. H. H. to the slaves in controversy, nor are they evidence to show that the title had passed from P. C. H. *Hooks* v. *Branch Bank at Montgomery*, 609

See Evidence, 9.

DEEDS, AND REGISTRY OF

1. A deed made in Georgia, by which in contemplation of marriage, slaves are conveyed to trustees, in trust for the separate use of the wife, is not such an instrument, as is by law required to be recorded, on the removal of the property to this State. *Smith* v. *Ruddle et al.* 28
2. To admit a deed to record, on proof of a subscribing witness, it must appear from the probate, that the witnesses subscribed in the presence of the maker of the deed, and in the presence of each other; and on the day and year mentioned in the deed. *Dolin* v. *Gardner*, 758

DEBTOR AND CREDITOR.

1. If a senior judgment creditor instructs the sheriff to hold up the execution issued thereon, it is fraudulent in law, as against subsequent judgment creditors, and will postpone the lien of his judgment on the real estate of the debtor in favor of junior judgments, upon which executions have issued, and been served, before a second execution is sued out on the elder judgment. *Patton* v. *Hayter, Johnson & Co.*, 18
2. A voluntary conveyance is good, as well against subsequent purchasers from the grantor, with notice, as against subsequent creditors, unless it be shewn that it was intended to defraud creditors. *Corprew* v. *Arthur et als.* 525

DEMAND.

1. The plaintiff is not confined to the proof of the demand, at the time stated in the notice. Proof of demand at any time after the receipt of the money by the sheriff, and before the motion, will be sufficient. *Evans* v. *Bank of the State et al.* 81

DEMURRER.

1. The want of profert, in a declaration of the instrument sued on, could only be reached at common law by special demurrer, and, since the passage of the statute requiring all demurrers to be general, a defect, that before could be reached in no other way than by special demurrer, is cured, and cannot be assigned as cause of demurrer. *Strange* v. *Powell*, 452
2. A plea pleaded by its name, without consent to receive it in that form, is bad on demurrer. *Shields* v. *Byrd*, 818

DEMURRER TO EVIDENCE.

1. The plaintiff having proved, that the defendant received from him for collection, on the 20th February, 1839, a promissory note; that the maker of the note was solvent at the time, and continued so until the year 1843, being in possession of property, and money having been made out of him by suit, during that time, and that a demand had been made of him for the money a few days before the institution of the suit, on the 31st March, 1848, and the defendant having demurred to the evidence: held, first, that the court was justified, under the testimony, in rendering judgment for the plaintiff, but was not authorized, without further proof, to assess the damages, with which the defendant was chargeable, for interest on the debt collected by him. *Boyd* v. *Gilchrist*, 849

DEPOSITION.

1. If a part of a deposition is legal, and a part, illegal evidence, and a party object to it as a whole, it is not error in the court to overrule the objection. In such a case it is the duty of the objecting party to point out the particular portion of the testimony that he deems illegal. *Melton* v. *Troutman*, 535
2. It is no ground for taking the deposition of a witness, to be read in a suit depending in Choctaw county, that the witness resides in Mobile; though Choctaw was taken in part from Washington county, where such a privilege exists. *Brown* v. *Turner*, 832

DIVORCE AND ALIMONY.

1. In a bill for divorce, an averment of the marriage, of the residence of complainant in this state for three years, next preceding its exhibition, and of the abandonment of the husband, for the space of three years, without the intention of returning, is sufficient. The readiness and willingness of complainant, at all times during the abandonment, to receive and live with her husband, need not be averred. *Gray* v. *Gray*, 779
2. A wife is not entitled to a divorce from her husband, on the ground of abandonment for three years, without the intention of returning, where, by her conduct, she has driven him from her society, and has continuously denied him the *locus penitentiae*, and privilege of returning. In such a case her consent to the separation must be intended. *Ib.* 779
3. Declarations made by the husband, of his intention not to live with his

DIVORCE AND ALIMONY—CONTINUED.

wife, can not operate as an estoppel, in a suit for a divorce, instituted against him by the wife, on the ground of abandonment. *Ib.* 779

4. Where a wife refuses to accept the provision, made for her support, by the husband, but elects her own place of residence, in contravention of his wishes, she can not complain, that he does not provide for her. *Ib.* 779
5. Under our statutes, the reason of the English rule, that the wife is a privileged suitor, as to costs, does not apply, and a court of chancery may, as in other cases, tax the *prochein ami* of the wife, with the costs of a suit instituted by her, for a divorce from her husband. *Ib.* 779

DOWER.

1. It is error to decree to a widow a sum certain, in lieu of dower, to be raised by sale of the estate to which the dower attaches. The decree should be for the payment annually of the sum ascertained to be the annual value of the dower interest. *Potier and McCoy* v. *Barclay and Husband*, 439
2. A marriage solemnized in accordance with our statute, between parties capable of contracting, with their free, full and mutual consent, is complete, without cohabitation, and entitles them respectively, to all the rights incident to that relation. *Ib.* 439
3. When a marriage is contracted and solemnized in good faith, the subsequent refusal of the wife to live and cohabit with the husband, will not work a forfeiture of her right to dower, at his death, in the lands, of which he was seized during the coverture. *Ib.* 439
4. Dower is a legal right, and whether application is made for its allotment to a court of equity or a court of law, the principle of decision is the same. When the right is consummated by marriage, seizin, and the death of the husband, the statute makes it imperative on the court to allot it. *Ib.* 439
5. When a widow files her bill to have dower allotted her, and during the pendency of the suit, intermarries, it is not error to make her husband a co-complainant. *Ib.* 439
6. When compensation is made in money, in *lieu* of an assignment of dower, the decree should not be for a gross sum, but for the payment annually, of the sum ascertained to be the annual value, of the dower interest. *Fry* v. *Mer. Ins. Co.*, 810
7. At common law, the widow is entitled to dower, in those estates, only, of which the husband, during the coverture, was invested with the legal title. *Crabb* v. *Pratt and wife*, 843
8. Under the statute, (Clay's Dig. 157 § 36) the widow is entitled to dower, in those estates, the legal title to which, at the time of his death, is held by another, for the use or in trust for the husband, but she is not dowable of an imperfect equity. *Ib.* 843

EJECTMENT AND TRESPASS TO TRY TITLE.

1. In an action of ejectment, if the plaintiff shows a superior *legal* title, unless estopped from asserting it, he must recover, whatever may be the equities of the parties. *Mitchell* v. *Robertson*, 412
2. A judgment, in an action of trespass to try titles, is not conclusive, either upon the plaintiff, or the defendant, in a subsequent suit for the same land. *Ib.* 412
3. Where a defendant in an action of trespass to try titles, in which a judgment has been rendered against him for the recovery of the land, and damages for its occupancy, sues out a writ of error, and dies, the suit must be revived in the [names of the heirs and personal representatives of the deceased. *Jordan* v. *Abercrombie and Thompson*, 580
4. A bond for title to land, though coupled with the possession, is but an equitable title, and cannot be set up as a bar to a recovery in ejectment.—*Doe ex dem. Nickles* v. *Haskins*, 619

ERROR.

1. A judgment will not be reversed for an error that works no injury to the party against whom it is committed. *Lindsay and Atkinson* v. *State*, 44
2. A judgment *nisi* on a forfeited bond which recites, that the defendant, to secure whose appearance such bond was executed, "being called, came not, but made default," without specifying the particular charge, that he was called to answer, is fatally defective, and a judgment final rendered thereon, is erroneous. *Ib.* 44
3. It is no ground for a reversal, that a reference to the master was prematurely made. *Br. Bank Mobile* v. *Strother*, 52
4. A decree of an orphans' court, which ascertains the interest of the several distributees of an estate, and directs their respective distributive shares to be set apart by commissioners, is such a final decree, as will authorize the revision of it on error. *Andrews, adm'r*, v. *Hall et al.* 85
5. Where on the trial of a suggestion against a sheriff and his sureties for the failure of the sheriff to return an execution, a jury is impaneled and sworn to assess the damages as well for a failure to "*execute*," as for a failure to return the execution, and judgment is rendered on the verdict, such judgment is erroneous and cannot be sustained. *Garey et al.* v. *Edwards and Allen*, 106
6. If a defendant has had the benefit of his defence, under the general issue, this court will not reverse the cause, because the court below may have erred, in sustaining a demurrer to a special plea, setting up the same defence. *Gillespie et al.* v. *Battle*, 276
7. An error, that works no injury to the party complaining of it, is not a ground of reversal in an appellate court. *Bush* v. *Bradford*, 317
8. Where a defendant, in an action of trespass to try titles, in which a judgment has been rendered against him for the recovery of the land, and

ERROR—CONTINUED.

damages for its occupancy, sues out a writ of error, and dies, the suit must be revived in the names of the heirs and personal representatives of the deceased. *Jordan* v. *Abercrombie and Thompson*, 580

9. An appellate court will not, in an indirect proceeding, undertake to decide upon the equity of a bill in chancery, or the propriety of an order made thereupon. *State* v. *Judge Orphans' Court of Macon*, 740

10. A writ of error will *not* lie to revise the action of an orphans' court, in refusing to set aside and vacate a decree, rendered at a previous term.—*Crothers* v. *Ross's distributees*, 800

See Amendment, 1.

ESTATES OF DECEASED PERSONS.

1. Whether, if, after the death of his intestate, the personal representative pays a balance of purchase money, due upon real estate, purchased by the intestate, in his life time, and which constitutes a lien on the estate, the distributive share of the heir at law, in the personality, will not be chargeable therewith, quere? *Crabb* v. *Pratt and wife*, 843

ESTATES TAIL, AND REMAINDER.

1. A will, by which two slaves were given to J. M., a married woman, "during her life, then to her bodily heirs. If there should be no heirs, for said negroes and increase to go back to the heirs, and an equal division made amongst the heirs"—uncontrolled by any other clause in the will, showing that by the term *bodily heirs*, the testator meant *children*, vests the absolute estate in the first taker. *Machen* v. *Machen*, 373

2. The slaves having been delivered to the legatee, by the executor of the testator, the entire property vested in the husband; and the repeated declarations of the husband, that the slaves belonged to the wife, will not vest the title in the wife, or prevent the executor of the husbannd, after his death, from recovering the slaves. *Ib.* 373

3. M. M. executes a deed, by which, she "gives, grants and bequeaths, unto W. S. and N. A. S.," together with "*all the heirs of P. S.'s body*, the sole right and title" to a female slave, and her increase, "to be the only right, and property of all her, the said P. S.'s children:" and warrants the title "to the aforesaid P. S.'s heirs forever." *Held:* that the deed vests the title to the slave immediately in the donees, who at the time of its delivery were capable of taking, and, it creating no trust, the after born children of P. S. can take no interest under it. *Thomas et al.* v. *Denton et al.* 583

4. A deed, by which a slave is conveyed to B., in trust, "for the use of M. C., wife of T. A. C., during her natural life, and, after her death, said slave to be the joint property of the heirs of the body of said M. C., vests the entire estate in M. C., and the slave, being reduced to the possession of the wife, becomes the absolute property of the husband. *Lenoir* v. *Rainey*, 667

ESTOPPEL.

1. Admissions, or declarations, will not operate an estoppel against the party making them, unless he derives some advantage, or gains some object thereby, or the opposite party is induced to act upon it, or sustains some injury in consequence of trusting to its truth. *Hunley et al.* v. *Hunley*, 92
2. Are not the stockholders in a corporation, which has by its regularly authorized agents created a lien on its effects in favor of a third person, estopped from asserting a lien created by said corporation in their favor? *quere.* *M. and C. P. R. R. Co.* v. *Talman and Ralstons*, 472
3. Admissions, or declarations, which have not been acted on by another, nuo been productive of injury to him, do not estop the party making them, from showing the truth to be otherwise. *Carter* v. *Darby*, 696
4. Where a suit is instituted by one, having the beneficial interest in a note, in the name of the payee, who is dead, for the use of the former, and the defendant appears, and suffers a judgment *nil dicit* to be rendered against him, he is estopped from afterwards moving to vacate the judgment on account of the death of the nominal plaintiff: and a security of the defendant in such a case, is as much concluded by the judgment as the defendant himself. *Powell* v. *Washington and Brock*, 803

See Deeds of Trust, 4.

EVIDENCE.

1. Neither the acts, or declarations, of a debtor, subsequent to the institution of a suit against him, to recover a tract of land sold under execution, can be given in evidence against the creditor. *Falkner* v. *Leith & Jones*, 9
2. A recital in an assignment of a land certificate, that it was transferred for a valuable consideration, is not evidence against one, who was a creditor of the assignor, at the time. The burthen of proving the consideration is cast upon the grantee. *Ib.* 9
3. In a suit against two, the admissions of one defendant are competent testimony. If the co-defendant desires to avoid the effect which such admissions may have upon him, he should ask a charge of the court. *Ib.* 9
4. The widow of a decedent is a competent witness in a controversy, involving the amount of advancements for which each of the several distributees is accountable. *Andrews, adm'r*, v. *Hall et al.* 86
5. Where testimony is introduced by a defendant, tending to prove false representations by the plaintiff, in a sale of blooded stock, as to age and soundness, it is competent for the plaintiff to repel the presumption of fraud, to show that he informed the defendant, after the sale, of an error in his representations, and offered to take back the property, which offer the defendant rejected. *Bush* v. *Bradford*, 317
6. E, was indebted to A, by note, in the sum of $280. As an off-set against this note, F, transferred to E, a note which he held on A, for $300, but A was not present, nor was E acquainted with the hand-writing of A. E

EVIDENCE—CONTINUED.

handed back the note of A, to F, that he might exchange it with A, for the note of E, for $280, and a few days thereafter, F handed to E his note for $280. Held, that this testimony was not sufficient to establish the genuineness of the signature of A, to the note of $300. *Hopper, adm'r*, v. *Ashley*, 457

7. A witness who has seen a party write once, but who says he does not know his hand-writing, may be asked, "has the hand-writing which you have seen, made any impression of the general character of his hand-writing upon your mind? If yea, does the signature of the writing presented to you, make an impression on your mind, amounting to a belief, that the writing shown you, is the writing of the plaintiff?" *Ib.* 457

8. The genuineness of a receipt being in issue, the court charged the jury, "that if the evidence, although it preponderated in favor of the receipt being genuine, still, if upon a fair and full examination of it, their minds were left in a state of doubt, and uncertainty, as to its being genuine, they should find in favor of the plaintiff upon that point." Held, that this charge could not be supported, as the jury were authorized to infer, that *demonstrative* evidence was required, and that *moral* evidence was insufficient. *Ib.* 457

9. The declarations of one in possession of personal property, tending to impugn the validity of a deed of trust, which he had previously executed, and under which the claimant, (against whom the testimony is offered,) deduces his title, is inadmissible. *Weaver* v. *Yeatmans*, 539

10. The declarations of a vendor are not admissible evidence against his vendee, without first establishing facts, from which an inference may fairly be deduced, that there was a combination between vendor, and vendee, to defraud the creditors of the former. *Ib.* 539

11. The petition of an administrator for the sale of land, being lost, or mis laid, the testimony of the judge of the court cannot be received, that the petition was in fact different from the recital of it in the orders of the court, setting forth the grounds set forth in the petition, for the sale of the land. *Heirs of Bishop* v. *Hampton*, 761

12. When a defendant when applied to for a deed, denies having it in his possession, and expresses his belief that it is in the register's office, where an ineffectual search is made for it, and also in the office of a lawyer, who once had it in possession, a sufficient predicate is laid for proof of the deed, by a certified copy, and no notice to the party to produce the deed, is necessary. *Shields* v. *Byrd*, 818

13. In an action for money had, and received, on the common counts in assumpsit, it is admissible to prove, by the admission of the defendant, that a receipt given by the defendant to the plaintiff, for the collection of a note therein described, in which the plaintiff, Malcolm G., was described

EVIDENCE—CONTINUED.

Macom G., was intended for the christian name of the plaintiff. *Boyd* v. *Gilchrist*, 849

See Practice at Law, 5, 6.

See Slander, 3, 4, 5, 6, 7, 8.

EXCEPTIONS, BILL OF.

1. A bill of exceptions is to be taken most strongly against the party excepting, and all reasonable presumptions will be indulged by an appellate court in favor of the judgment of a subordinate tribunal. *Patton* v. *Hayter, Johnson & Co.*, 18
2. If an alternative state of facts is presented for the determination of the primary court, one of which will sustain, and the other reverse its judgment, it devolves upon the party against whom its decision has been made to negative, in his bill of exceptions, either by positive statement, or by a recital of *all* the evidence, the alternative which supports the judgment.—*Ib.* 18

EXECUTION, PROPERTY EXEMPT FROM.

1. A defendant in execution, may sell articles exempt by law from sale by execution, after the execution comes to the sheriff's hands, and convey a good title to the purchaser. But if the thing received as an equivalent, or in exchange, is not also exempt from levy, or sale, it may be levied on. *Pool* v. *Reid*, 826

EXECUTION, WRIT OF.

1. Land acquired by entry, and for which a receipt of full payment has been executed by the register, vests such title in the person to whom it is given, as may be sold under execution at law. *Falkner* v. *Leith & Jones*, 9
2. Where a plaintiff suffers a term to elapse between the return of his first execution, and the issuance and delivery to the sheriff of an alias, the lien of the first is lost and a junior execution issued and delivered to the sheriff, before the alias is sued out, acquires a superior lien. *Br. Bank Montgomery* v. *Broughton and Duprey*, 127
3. Although, when property is levied on under an execution, and bond is given to try the right, it is in the custody of the law, and not subject to the levy of other executions, which have not a superior lien, this does not affebt the lien of those executions, that have been regularly renewed, on the surplus that remains from the sale of the property, after discharging the older execution. In such a case, the lien is suspended, not lost.—*Ib.* 127
4. If a plaintiff in execution, after it has been levied on property of the defendant, instructs the sheriff to stay further proceedings thereon, this in law is constructively fraudulent as against junior judgment creditors, whatever the motive may have been which induced the instruction, and

EXECUTION, WRIT OF—CONTINUED.

its lien will be postponed in favor of other executions that have issued and been delivered to the sheriff, before the plaintiff sues out an alias.—*Ib.* 128

5. The estimated cash value of land, in the neighborhood in which it is situated, and in which it is to be sold, is a circumstance proper to go to the jury, to determine whether the levy was sufficient, or not. The sum for which the land actually sold, is not the only criterion of its value. *Patterson* v. *Powell et al.* 205

6. It is a sufficient reason for quashing an execution, at the instance of a party, or privy, that it issued after the death of the plaintiff; but the invalidity of the execution, does not warrant the court in setting aside a sale of land made under It, against a *bona fide* purchaser, without notice. *Nuckols* v. *Mahone*, 212

7. An execution issued on a judgment, after the death of the plaintiff, is void, and a sale of land made under it, conveys no title to the purchaser. *Stewart* v. *Nuckols*, 225

8. An execution issued in the name of a sole plaintiff, who is dead at the time of its issuance, is a nullity, and a sheriff is not liable for failing to execute it. *Graham and Taylor, adm'rs*, v. *Chandler et al.* 342

9. Where there is a judgment against two, or more, and one defendant dies before execution issued, it may be issued against all, but can be levied on the goods of the survivors only. *Thompson* v. *Bondurant and King*, 346

10. To authorize the issue of execution against the surety of an administrator, the bond of the administrator, rendition of a decree against him, the issue of execution against him, and return of no property thereon, must appear of record before the bond can have the force and effect of a judgment. If any of the sureties to the bond die before all these facts appear of record, no statute judgment can be rendered against them. *Ib.* 346

11. Where an execution issues against the sureties of an administrator, some of whom were dead defore the statute judgment was rendered, the court should not quash the execution for this cause, but amend, by striking out their names. *Ib.* 346

12. Where the purchase money, for land, is paid by *one* person, and the deed is taken in the name of *another*, the former acquires but an equitable estate, a sale of which, under execution at law, vests no title in the purchaser. *Mitchell* v. *Robertson*, 412

13. If an execution, on a judgment, against a sole defendant, issues, after his death, it is a nullity, and a sale under it, of land, which the defendant, in his life time, had fraudulently conveyed to a third person, vests no title in the purchaser. *Hurst & Shipp* v. *Weathers*, 417

14. If a creditor of one, who has taken the benefit of the bankrupt act, has reduced his debt to judgment, before the bankrupt obtains his certificate of final discharge, he will not be compelled to bring a new suit on the

EXECUTION, WRIT OF—CONTINUED.

judgment, but may cause execution to issue thereon, subject to be set aside or quashed on the application of the bankrupt. *Cogburn and Powell* v. *Spence and Elliott*, 549

15. An execution, issued on a judgment, which has been rendered against a bankrupt, before he obtains his certificate of final discharge, is not void, but voidable only, at the instance of the bankrupt. *Ib.* 549

16. An execution, which is voidable only, and not void, affords full and ample protection to the officer, who obeys its mandate. *Ib.* 549

17. A voidable execution, until avoided, is a protection to the party, at whose instance it issued, and was executed. *Ib.* 549

18. If a person, not a party to the record, causes an execution to be issued, in the name of a dead plaintiff, and levied on property, to which a claim is interposed, he cannot be compelled, by process of attachment, to pay the costs of the claim suit, it not appearing, that he was a gratuitous volunteer, or that he was aware, at the time, of the plaintiff's death. In such a case, the liability of the party must be fixed by suit in the ordinary mode. *Scott* v. *John*, 566

19. Whether, if one person uses the name of another, without his knowledge or consent, in a suit, in the subject matter of which, he has not, and never had any interest, such person would not be liable to attachment, as for a contempt—*quere*. *Ib.* 566

20. An execution, issued on a judgment of the orphans' court, against an administrator, which is not made returnable to a regular term of the county court, is void, and a return of "no property" on such an execution, will not authorize the issuance of an execution on the administration bond against said administrator and his securities. *Little et al.* v. *Knox, adm'r*, 576

21. Where a judgment is rendered against two defendants, and one dies, the lands of the survivor may be sold, under an execution, issued on such judgment, without its being revived by *scire facias*. *Martin* v. *Branch Bank at Decatur*, 587

22. When land has been sold under execution, a deed by the defendant in execution, to his vendee, holding his bond for title for the land, *made after the sale under execution*, will not prevail against the purchaser at the sheriff's sale, who has had the legal title of the defendant conveyed to him by the sheriff. *Doe ex dem. Nickles* v. *Haskins*, 620

23. When the court has jurisdiction of the subject matter, and renders a judgment, upon which an execution, regular upon its face, issues, it will be a protection to the sheriff acting under it, no matter how irregular the proceedings of the court may be. *Averett* v. *Thompson*. 678

24. Where an execution issues against T., who is described as the administrator of C., but the sheriff is required to levy upon the goods and chattels, lands, and tenements of T., the property of T. may be taken in execution. *Ib.* 678

EXECUTION, WRIT OF—CONTINUED.

See Debtor and Creditor, 1.

See Husband and Wife, 5.

See Principal and Surety, 2, 3.

EXECUTORS, ADMINISTRATORS, AND THEIR SURETIES.

1. A regular grant of administration *eo instanti* invests the administrator with the personal assets of the intestate; and they are not subject to seizure and sale under an execution issued on a judgment rendered against the intestate, after his death, notwithstanding the administrator may have converted, or fraudulently disposed of them. *Snodgrass* v. *Cabiness*, 160

2. T obtained a judgment for the use of M, against P, and sued out a *ca. sa.*, and died, after which, P executed a prison bounds bond, which was made payable to T, for the use of M. Held, that the executors of T, could not maintain a suit on this bond, against P, for a breach of the condition.—*Tait* v. *Parkman and Weaver*, 253

3. Prior to the passage of the act of 4th February, 1846, a court of chancery would not entertain a bill filed by an administrator *de bonis non* against a former executor or administrator in chief of the same estate, for an account of assets, that had been wasted, embezzled or misapplied by him. *King and Ansley* v. *Smith and Steele*, 264

4. An administrator is not chargeable with the value of property of the estate, sold by him and delivered to the purchaser, before he has complied with the terms of sale, if the purchaser afterwards complies with the terms of the sale. *Dean and wife* v. *Rathbone's adm'r*, 328

5. If an administrator, acting in the line of his duty, and within the scope of his authority, exercises good faith and ordinary diligence in regard to the property entrusted to his care, he is not responsible for a loss, occasioned by the subsequent insolvency of those who may be indebted to the estate. *Ib.* 328

6. An administrator is bound to pay due regard to the interest of the estate, and if the circumstances of a case evince a want of reasonable care and diligence, and a consequential loss to the estate, he must be held liable for it. *Ib.* 328

7. It is the duty of an administrator to defend the estate he represents, against claims, which he believes are unjust, and if, under an honest impression that a demand against it ought not to be paid, he incurs expenses in litigating it, they should be allowed him in the settlement of his administration accounts. *Green, adm'r*, v. *Distributees of Fagan*, 335

8. If an administrator, having a good defence to a claim preferred against the estate, neglects to interpose it, but suffers judgment to go against him, and in consequence of such neglect, he is compelled to resort to further and other proceedings, to relieve himself of the judgment, the expenses of such subsequent litigation do not constitute a proper charge against the estate. *Ib.* 335

EXECUTORS, &c.—CONTINUED.

9. If an administrator is aware of a credit, to which the estate of his intestate is entitled, on a claim presented against it, but neglects to avail himself of it, and permits judgment to be entered against him for the whole amount of the claim, he is personally chargeable to the extent of such credit. *Ib.* 335
10. When a sheriff is appointed administrator, and assumes to act under the order, by receiving the assets, he is estopped from denying that he is administrator, though letters of administration were not issued to him.—*Thompson* v. *Bondurant and King*, 346
11. If administrators execute a joint bond, they are liable for the acts of each other, and both are bound to protect the joint securities from the consequences of the acts of either. *Little et al.* v. *Knox, adm'r*, 576
12. An execution, issued on a judgment of the orphans' court, against an administrator, which is not made returnable to a regular term of the county court, is void, and a return of "no property" on such an execution, will not authorize the issuance of an execution on the administration bond against said administrator and his securities. *Ib.* 576
13. If one sells the goods of an estate before administration granted, and receives the money therefor, an after appointed administrator, may sue him in trover for the conversion, or waive the *tort*, and bring assumpsit for money had and received. *Upchurch* v. *Norsworthy*, 705
14. If one, without authority, sells the goods of an estate, and receives the money therefor, it is no defence to an action for its recovery, instituted against him by the administrator, that the sale was void, and vested no title in the purchaser. *Ib.* 705
15. Where a suit is instituted on an administration bond, against the administrator and his sureties, each may sever, and plead as many pleas as he may deem necessary to his defence. *Williams* v. *Hinkle et als.* 713
16. In an action on an administration bond, against the administrator and his sureties, suggesting a *devastavit*, a judgment against the administrator *de bonis intestatis*, is not conclusive against the sureties, but it devolves on the plaintiff to show an actual *devastavit*, in order to fix their liability.—*Ib.* 713
17. A judgment rendered against an administrator *de bonis intestatis*, in an action on a note payable to, and indorsed by him, in his representative character, is a clerical misprision, and in an action on the administration bond, against the administrator and his sureties, is insufficient to charge the sureties for an actual *devastavit* of the administrator. *Ib.* 713

FORCIBLE ENTRY AND DETAINER.

1. A court of equity cannot interpose by injunction, to restrain a plaintiff, who has obtained judgment, on a writ of forcible entry and detainer, from having restitution of the possession, notwithstanding he is insolvent, and

FORCIBLE ENTRY, &c.—CONTINUED.

the complainant holds the undisputed legal title to the land. *Hamilton et al.* v. *Adams*, 596

FORTHCOMING BOND.

1. A judgment was rendered against S. R., in favor of W. & C., upon which execution issued against S. R., which being levied on a slave, he gave a forthcoming bond for its delivery, with B. as his surety. The judgment is described in the bond as having been rendered against S. R. and B., and being returned forfeited, and an execution having issued thereon against S. R. and B: held, that the discrepancy between the bond and the execution was so great, that no execution could issue upon it, and that a sale of land made under it, would be set aside. *Nicolson* v. *Burke*, 353

FRAUD.

1. If a senior judgment creditor instructs the sheriff to hold up the execution issued thereon, it is fraudulent in law, as against subsequent judgment creditors, and will postpone the lien of his judgment on the real estate of the debtor in favor of junior judgments, upon which executions have issued, and been served, before a second execution is sued out on the elder judgment. *Patton* v. *Hayter, Johnson & Co.*, 18
2. If a plaintiff in execution, after it has been levied on property of the defendant, instructs the sheriff to stay further prooeedings thereon, this in law is constructively fraudulent as against junior judgment creditors, whatever the motive may have been which induced the instruction, and its lien will be postponed in favor of other executions that have issued and been delivered to the sheriff, before the plaintiff sues out an alias.—*Br. Bank Montgomery* v. *Broughton and Duprey*, 128
3. A regular grant of administration *eo instanti* invests the administrator with the personal assets of the intestate; and they are not subject to seizure and sale under an execution issued on a judgment rendered against the intestate, after his death, notwithstanding the administrator may have converted, or fraudulently disposed of them. *Snodgrass* v. *Cabiness*, 160
4. If C. and H. combine to perpetrate a fraud on the creditors of an estate at a sale by the administrator of the property thereof, and C. *alone* becomes the purchaser, and H. *afterwards* acquires possession of the property under a contract with C., the *mere possession* of it by H., or those claiming under him, will not, of itself, give them the right to retain it as against C. or his assignee. *Ib.* 160
5. Where testimony is introduced by a defendant, tending to prove false representations by the plaintiff, in a sale of blooded stock, as to age and soundness, it is competent for the plaintiff to repel the presumption of fraud, to show that he informed the defendant, after the sale, of an error

FRAUD—CONTINUED.

in his representations, and offered to take back the property, which offer the defendant rejected. *Bush* v. *Bradford*, 317

6. Though, as between the grantor, and grantee, of a fraudulent deed, the deed is obligatory, yet a *bona fide* purchaser from the fraudulent grantor, or his representative, may insist on the fraud in avoidance of the deed.—*McGuire, adm'r*, v. *Miller*, 394

FRAUDS, STATUTE OF.

1. Slaves being conveyed to trustees, for the separate use of the wife, with remainder to her children, they permitted the husband to have the possesion of the slaves, which he retained for more than three years, and then sold them. Held, that the statute of frauds, had no applcation, and that the fact, that the husband had been in possession three years before his sale, did not affect the title of those in remainder. *Smith* v. *Ruddle et al.* 28
2. By the statute of frauds, a parol contract, for the sale of land, is voidable merely, not absolutely void. *Gillespie et al.* v. *Bntlle*, 276
3. A voluntary conveyance is good, as well against subsequent purchasers from the grantor, with notice, as against subsequent creditors, unless it be shewn that it was intended to defraud creditors. *Corprew* v. *Arthur et als.* 525
4. A voluntary deed of gift of slaves, to one, in trust for the children of the donor, not acknowledged, or proved in open court, but before a justice of the peace, and recorded, is void under the statute of frauds, against a *bona fide* purchaser from the donor. *Foster et al.* v. *Mitchell et al.* 571
5. Although a deed may be insufficient to vest title in the donee, under the statute of frauds, because not acknowledged or proved in open court, it may still operate as a declaration of the donor, evidencing a gift, provided the deed was consummated by a delivery in fact; and the fact, that the donees are infants, residing with their father, does not dispense with proof of a delivery. *Ib.* 571

GAMING.

1. The offence of gaming is complete by playing *once*, and does not require a repetition of it. *Cameron* v. *The State*, 383
2. It is not error to charge the jury, "that if they believed, from the testimony, that the defendant played cards at the house mentioned by the witness, and that it was, at the time, a house to which people did resort, then the defendant was guilty." *Ib.* 383
3. A promise by the maker, to pay a note founded on a gaming consideration, to the holder, *after* he had acquired it, with knowledge of its illegality, will not enable him to recover upon it, although after such promise, the holder released a debt due from another person to him, to secure which he had previously received the note. *Finn and Dulaney* v. *Barclay et al.* 626

GAMING—CONTINUED.

4. The maker of a note, given upon a gaming consideration, is entitled to be relieved in chancery against its payment, without offering to return the money, or other thing, received when the note was executed. *Ib.* 626

See Pawn, 3.

GARNISHMENT AND GARNISHEE.

1. If a plaintiff in attachment, after a garnishee has answered, disclosing the fact, that the demand sought to be condemned has been transferred, suffers several terms to elapse without taking the proper steps to bring the transferee into court, to contest with him the validity of the transfer, it is not error in the court to discharge the garnishee. *Mock* v. *King*, 66
2. The undivided interest of one of several distributees of an estate, in the honds of an administrator *de bonis non*, &c. is not subject to the process of garnishment. *Ib.* 66
3. A plaintiff in garnishment, as against the garnishee, is substituted merely to the rights of his debtor, and cannot subject a demand, on which the debtor himself, if suing, would not be entitled to recover. *McGehee* v. *Walke*, 183
4. When a garnishee in attachment, answers, denying indebtedness to the defendant in attachment, an issue may be made up, with the consent of the plaintiff, to try the fact of such indebtedness, between the defendant in attachment, and the garnishee, upon the affidavit of the former, controverting the answer of the latter. *Twelves & Co.* v. *Lodano*, 732
5. An attachment was sued out by T., against F., and L. was garnisheed as a debtor of F. After service of the garnishment, F. obtains judgment against L. for the amount of the debt due from him, in the same court in which the attachment is pending, and execution issuing thereon, L. paid the amount to the sheriff, by whom it was paid to the attorney of F., who, pursuant to instructions previously given him by F., paid the money to a third person: held, that upon this state of facts, the garnishee was liable to the plaintiff in attachment. *Ib.* 732

GIFT.

1. The declarations of a grandfather, that he had given certain slaves to the children of his son, will not constitute a valid gift, in the absence of proof of an actual delivery, the slaves being found in his possession, at his death. The fact that the slaves were under the control of the father of the children will not vary the case, there being no proof that they were delivered to him for the purpose of consummating the gift. *Hunley* v. *Hunley*, 91
2. A voluntary deed for slaves, delivered to the donees, but reserving to the donor a life estate in them, operates as a present gift, and vests the title immediately in the donees. *Summerlin* v. *Gibson*, 406
3. Although a deed may be insufficient to vest the title in the donee, under

GIFT—CONTINUED.

the statute of frauds, because not acknowledged or proved in open court, it may still operate as a declaration of the donor, evidencing a gift, provided the deed was consummated by a delivery in fact; and the fact, that the donees are infants, residing with their father, does not dispense with proof of a delivery. *Foster et al.* v. *Mitchell et al.* 572

4. M. M. executes a deed, by which, she "gives, grants and bequeaths, unto W. S. and N. A. S.," together with "*all the heirs of P. S.'s body*, the sole right and title" to a female slave, and her increase, "to be the only right, and property of all her, the said P. S.'s children:" and warrants the title "to the aforesaid P. S.'s heirs forever." *Held:* that the deed vests the title to the slave immediately in the donees, who at the time of its delivery were capable of taking, and, it creating no trust, the after born children of P. S. can take no interest under it. *Thomas et al.* v. *Denton et al.* 583

See Marriage and Marriage Settlement, 3.

GUARDIAN AND WARD.

1. A final settlement made by a guardian with the orphans' court, shewing the amount of his indebtedness to his ward, is conclusive alike on the guardian and his sureties, unless they can impeach it for fraud. *Chilton* v. *Parks et al.* 671

2. When the liability of a surety of a guardian, is fixed for the default of his principal, he can claim no exemption from that liability, because the minor might charge a previous surety of the guardian, with all, or some portion of the debt. *Ib.* 671

3. Upon the application of a minor, who has arrived at the age of fourteen years, the orphans' court is authorized to appoint such guardian as the minor may elect, *without notice* to the guardian previously appointed. *Kelly* v. *Smith*, 687

HOTCHPOT.

1. Where M. dies, leaving a widow, and three children, each of whom had been advanced in their father's life time, and, on a final settlement of the estate, one of the children brings his advancement into hotchpot, but the other two refuse to do so, the distributive share of the widow is not increased thereby, but is to be ascertained by reference to the *number* of children, whether all of them share in the distribution or not. *May* v. *May*, 177

HUSBAND AND WIFE.

1. If a husband, with no intention of returning, removes from this into another state,—declares his determination to abandon his wife, and absents himself for more than five years, the law confers on her the capacity of contracting and suing, as though she were a *feme sole*. *Mead* v. *Hughes's Adm'r*, 141

HUSBAND AND WIFE—CONTINUED.

2. The equitable right of the wife to a settlement of her undivided distributive share of the estate of her deceased father, in the hands of his executrix, is a consideration sufficiently valuable, to support a deed to her from her husband, relinquishing such distributive share for her sole and separate use. *Bradford* v. *Goldsborough*, 311
3. Such a deed, although inoperative at law, will be enforced, in equity, against an execution creditor of the husband, who is seeking to condemn the property, for the satisfaction of of his debt, after it has come to the possession of the wife. *Ib.* 311
4. The slaves having been delivered to the legatee, by the executor of the testator, the entire property vested in the husband; and the repeated declarations of the husband, that the slaves belonged to the wife, will not vest the title in the wife, or prevent the executor of the husbannd, after his death, from recovering the slaves. *Machen* v. *Machen*, 373
5. A deed, by which a slave is conveyed to B., in trust, "for the use of M. C., wife of T. A. C., during her natural life, and, after her death, said slave to be the joint property of the heirs of the body of said M. C., vests the entire estate in M. C., and the slave, being reduced to the possession of the wife, becomes the absolute property of the husband. *Lenoir* v. *Rainey*, 667
6. If husband and wife be sued on a note given by the wife *dum sola*, the marriage must be averred, or the declaration is bad, either on demurrer, or on error. *Tanner et al.* v. *White*, 798

See Marriage and Marriage Settlement, 2, 3.

See Separate Estates of Married Women, 3, 4, 5, 6, 7, 8.

INDIAN TITLES.

1. A purchaser from an Indian reservee, acquires no title by his purchase, until the contract is approved by the president: when this is done the purchaser is entitled to a patent, and when it issues, it vests the fee in the patentee. *Haden* v. *Ware*, 149
2. If A., an Indian reservee under the Creek treaty of 1832, by arrangement with W. procures his reservation to be certified by the government agent, as sold to W., in order that W. may obtain the patent, and then convey the land in fee simple, to A., it is a fraud upon the government, and a court of equity will not interfere in a controversy between the parties or their assignees. *Corprew* v. *Arthur et als.* 525
3. If an Indian reservee under the Creek treaty of 1832, fails to sell and convey his reservation, in five years, in the mode prescribed by the treaty, and at the end of that period manifests no desire to remain in the State, his reservation will revert to and revest in the United States, without an entry or other act on the part of its agents. *Ib.* 525

INDICTMENT.

1. An indictment, under the 18th section of the first chapter of the penal

INDICTMENT—CONTINUED.

code, for inveigling slaves, &c., must allege all the facts necessary to create the offence denounced by the statute. An indictment charging the offence generally, as a larceny at common law, is insufficient. *Williams* v. *The State*, 260

2. Upon a conviction on an indictment for the larceny of a slave, in general terms, the prisoner cannot be sentenced to more than five years' imprisonment in the penitentiary. *Ib.* 260

INDORSEMENT.

1. An irregular indorsement on paper, not negotiable, is not embraced by the act of 1828, and the liability thereby created, is, that the indorser will pay it, if, by the use of proper diligence, the money cannot be collected from the maker. *Fulford* v. *Johnson, Hendon & Co.* 385

2. The question of diligence, in the case of an irregular indorsement of non-negotiable paper, is for the jury; but to constitute such diligence as will bind the indorser, the maker must be sued to the first court after the maturity of the paper, unless it is dispensed with by the insolvency of the maker, or some such valid reason. *Ib.* 385

3. When the note of a third person is assigned by an irregular indorsement, in consideration of a pre-existing debt, due from the indorser to the indorsee, the plaintiff, whether he sues on the indorsement, or the pre-existing debt, is equally bound to show proper diligence in endeavoring to collect the note from the maker. *Ib.* 285

4. Where a plaintiff sues the indorser, on his indorsement of a promissory note, his right to recover cannot be made out by proof of a fraudulent concealment, or misrepresentation by the indorser, of the maker's ability to pay. *Ib.* 385

5. Where the note of a third person is indorsed, and delivered in absolute payment of a pre-existing debt, an action cannot be maintained on the original debt, but the remedy of the creditor is on the indorsement alone, unless the transfer of the note is affected with fraud, or misrepresentation as to the solvency of the maker. *Ib.* 386

6. If a note for more than $50, is indorsed and delivered by the holder to a third person, suit must be brought against the maker, to the first circuit or county court, to which he can be sued, next after the maturity of the note; and if the indorsee remits a part of the demand, so as to bring it within the jurisdiction of a justice of the peace, a suit in a justice's court, though prosecuted to a return of no property, is insufficient to charge the indorser. *Ib.* 386

INSOLVENT DEBTORS.

1. A surety who pays a debt for his principal, six months after his estate has been declared insolvent, may file his claim against the estate, within six months afterwards, if final settlement has not been made, although the

INSOLVENT DEBTORS—CONTINUED.

creditor had not filed the claim against the estate. *Powe and Smith, adm'rs*, v. *Executors of Tyson*, 221

2. An actual surrender, in discharge of the condition of a prison bounds bond, cannot be vitiated, by the motive, or intention, which influenced the surrender into custody. *Tait* v. *Parkman and Weaver*, 253

3. T obtained a judgment for the use of M, against P, and sued out a *ca. sa.*, and died, after which, P executed a prison bounds bond, which was made payable to T, for the use of M. Held, that the executors of T, could not maintain a suit on this bond, against P, for a breach of the condition.—*Ib.* 253

4. In determining, whether an agreement by a creditor to accept from his debtor a less sum, than he owes, in full satisfaction of the debt, is without consideration, the insolvency of the debtor, at the time, can have no influence. His *obligation* to pay, is not impaired by his insolvency. *Pearson and Fant* v. *Thomason*, 700

See Pleading at Law, 4.

INTENDMENTS AND LEGAL PRESUMPTIONS.

1. Where property is found in the possession of a family composed of several individuals, the law refers the possession to him who has the title.—*Lenoir* v. *Rainey*, 667

2. In the absence of proof, it will be intended by the courts of this state, that the common law is in force in North Carolina. *Averett* v. *Thompson*, 678

3. When the judgment entry recites, that the parties appeared, and the defendant said nothing in bar, &c. and a declaration is found in the record, setting forth a substantial cause of action, it will be deemed sufficient, though in the caption, the declaration is entitled, as of a term, subsequent to the judgment, which it will be intended is a clerical misprision. *Tunstall* v. *Donald & Marshall*, 841

See Sheriff and Sureties, 6.

INTEREST.

1. The banks of this state, cannot discount notes, or bills, at the rate of eight *per cent. per annum*, having a longer period to run than twelve months: nor can they extend a debt due them, and charge interest by way of annual discount, in advance. They may discount a bill, or note, having more than twelve months to run, by ascertaining the present worth of the note, or bill, at eight *per cent.*, for the time it has to run. *Br. Bank Mobile* v. *Strother*, 51

2. A discount of a note, made by calculating the interest for one year, and multiplying this sum by the number of years the note has to run, and deducting the amount thus ascertained, from the amount of the note, is illegal, whether made by a bank, or by an individual. *Ib.* 51

3. The plaintiff having proved, that the defendant received from him for col-

INTEREST—CONTINUED.

lection, on the 20th February, 1839, a promissory note; that the maker of the note was solvent at the time, and continued so until the year 1843, being in possession of property, and money having been made out of him by suit, during that time, and that a demand had been made of him for the money a few days before the institution of the suit, on the 31st March, 1848, and the defendant having demurred to the evidence: held, first, that the court was justified, under the testimony, in rendering judgment for the plaintiff, but was not authorized, without further proof, to assess the damages, with which the defendant was chargeable, for interest on the debt collected by him. *Boyd* v. *Gilchrist*, 849

JOINT TENANTS AND TENANTS IN COMMON.

1. The possession of one tenant in common may become antagonistic, and exclusive, of a co-tenant, and will become so by an unequivocal, and notorious denial of the right of the co-tenant. *Abercrombie* v. *Baldwin et als.* 363

JUDGMENT AND DECREE.

1. A judgment *nisi* on a forfeited bond which recites, that the defendant, to secure whose appearance such bond was executed, "being called, came not, but made default," without specifying the particular charge, that he was called to answer, is fatally defective, and a judgment final rendered thereon, is erroneous. *Lindsay and Atkinson* v. *The State*, 44
2. Where a suit is instituted by one, having the beneficial interest in a note, in the name of the payee, who is dead, for the use of the former, and the defendant appears, and suffers a judgment *nil dicit* to be rendered against him, he is estopped from afterwards moving to vacate the judgment on account of the death of the nominal plaintiff: and a security of the defendant in such a case, is as much concluded by the judgment as the defendant himself. *Powell* v. *Washington and Brock*, 803

LANDLORD AND TENANT.

1. The landlord may maintain assumpsit against the sheriff, for money had and received, for rent due from the tenant at the time of the levy of an execution. *Thompson* v. *Merriman*, 166
2. The sheriff cannot set up, in bar of the action, or by way of off-set, a debt due from the landlord to the tenant. *Ib.* 166

LIEN.

1. If a senior judgment creditor instructs the sheriff to hold up the execution issued thereon, it is fraudulent in law, as against subsequent judgment creditors, and will postpone the lien of his judgment on the real estate of the debtor in favor of junior judgments, upon which executions have issued, and been served, before a second execution is sued out on the elder judgment. *Patton* v. *Hayter, Johnson & Co.* 18

LIEN—CONTINUED.

2. Although, when property is levied on under an execution, and bond is given to try the right, it is in the custody of the law, and not subject to the levy of other executions, which have not a superior lien, this does not affect the lien of those executions, that have been regularly renewed, on the surplus that remains from the sale of the property, after discharging the older execution. In such a case, the lien is suspended, not lost.—*Br. Bank Montgomery* v. *Broughton and Duprey*, 127
3. Are not the stockholders in a corporation, which has by its regularly authorized agents created a lien on its effects in favor of a third person, estopped from asserting a lien created by said corporation in their favor? *quere. M. and C. P. R. R. Co.* v. *Talman and Ralstons*, 473
4. Where several notes, secured by deed of trust, are assigned by the payee, to different persons, at different times, the assignment of each note is, *pro tanto*, an assignment of the security; and the liens of the several assignees are to be preferred, according to the priority of the assignments, without reference to the maturity of the notes. *Nelson & Hatch* v. *Dunn et als.* 502
5. If N. & H. sell property, which is subject to two incumbrances, *to C.*, the *junior* incumbrancer, in extinguishment of C's lien, this will not defeat the right of the *senior* incumbrancer, to have satisfaction of the property, more especially, if C. purchase, with actual notice of the prior equity. *Ib.* 502
6. Whether, if, after the death of his intestate, the personal representative pays a balance of purchase money, due upon real estate, purchased by the intestate, in his life time, and which constitutes a lien on the estate, the distributive share of the heir at law, in the personality, will not be chargeable therewith, quere? *Crabb* v. *Pratt and wife*, 843

See Fraud, 1.

LIMITATION AND NON-CLAIM, STATUTES OF.

1. The statute of limitations will not apply, because a part of the debt has been paid. The complainant's right to relief exists, whilst the debt continues, and the payment of any portion of it, will be applied to the payment of the principal, and lawful interest. *Br. Bank Mobile* v. *Strother*, 51
2. Where a notary public fails to give to the indorser of a negotiable note the notice requisite to charge him, the statute of limitations of six years (Clay's Dig. 329, § 90) commences to run, in favor of the sureties on his official bond, from the date of the default, and not from the time of its discovery, or the ascertainment of the damage, by the injured party. *Governor* v. *Gordon*, 72
3. Where the statute of limitations of another state is relied on by the plaintiff in a suit, as vesting in him a right to the property in controversy, if there is a saving or exception in the statute, that will restrain its opera-

LIMITATION, &c.—CONTINUED.

tion in favor of the plaintiff, it is the duty of the defendant to show it, and not that of the plaintiff to negative its existence. *Howell* v. *Hair*, 194

4. A saving or exception, restrictive of its operation, not found in a statute of limitations, will not be *implied*. *Ib.* 195

5. The mere fact that a party, having the rightful title to property in Georgia, is a resident of the state of Alabama, and is ignorant as to where the property is, does not relieve him from the necessity of instituting his action for its recovery, within the period, prescribed by the statute of limitations of the former state to bar his right. *Ib.* 194

6. A purchaser of property, for valuable consideration, without notice, who has been in the quiet and peaceable possession of such property, in the state of Georgia, for a period sufficient to render the statute of limitations of that state an available bar, may recover it from the former owner, from whose possession it was tortiously or feloniously taken, and who has retaken it from such purchaser, after the statute had completed a bar. *Ib.* 194

7. The statute of limitations of the state in which property is, having created a bar, the title of the possessor of it is complete, although it may be afterwards removed into another state having a longer period of prescription. *Ib.* 194

8. When the statute of non-claim begins to run, it will continue, notwithstanding the administrator removes from the State, and continues absent, until the bar is perfect. *Lowe's adm'r* v. *Jones*, 545

9. An administrator died within two months after grant of letters to him, and after a considerable time, a successor was appointed, to whom, fourteen months after his appointment, presentment of a claim was made: Held, that although there were but sixteen months during which there was an administrator in existence, to whom the claim could be presented, yet, as more than eighteen months had elapsed from the time the statute began to run, the bar was complete. *Ib.* 545

10. When title by prescription is not complete, when the law is changed, altering the period, the past time is effaced, and the substituted law determines the time, which bars a recovery. *Doe ex dem. Nickles* v. *Haskins*, 619

11. Where the accounts between parties are not mutual, but are all on one side, the entire account is not taken out of the bar of the statute of limitations, because one, or more items of the account, are not within the statute. *Todd* v. *Todd*, 743

LIS PENDENS.

1. In all cases, where the object is to deprive a party of rights acquired *bona fide*, by affecting him with constructive notice of a pending suit, the *lis pendens* begins from the service of the *subpoena*, and not from the time the bill is lodged in the register's office. *Goodwin et al.* v. *McGehee et al.* 233

See Vendor and Vendee, 9.

MALICIOUS MISCHIEF.

1. On the trial of an indictment for malicious mischief, under the fifth section of the fourth article of the penal code, the person whose property is injured, is not a competent witness for the state. *Blackstone* v. *State*, 415

MALICIOUS PROSECUTION.

1. Where the defendant in an attachment suit, brings an action vs. the plaintiff for maliciously suing out the attachment, and offers in evidence, in connexion with the answers of such plaintiff, to interrogatories filed in said suit, under the statute, the interrogatories and *his own affidavit* therein, for the purpose of explaining the answers, without pointing out the necessity of any explanation, or the particular part relied upon for the purpose, the court may properly reject the whole. *Melton* v. *Troutman*, 535

MANDAMUS.

1. A *mandamus* will not be granted to command an inferior tribunal to do that, which it could not legally do without such mandate. *State* v. *Judge Orphans' Court of Macon*, 740
2. Where the judge of an orphans' court refuses to proceed in the settlement of an estate, should not an application for a *mandamus* be first made to the circuit court? *Quere. Ib.* 740

MARRIAGE AND MARRIAGE SETTLEMENT.

1. Slaves being conveyed to trustees, for the separate use of the wife, with remainder to her children, they permitted the husband to have the possesion of the slaves, which he retained for more than three years, and then sold them. Held, that the statute of frauds, had no applcation, and that the fact, that the husband had been in possession three years before his sale, did not affect the title of those in remainder. *Smith* v. *Ruddle et al.* 28
2. Since the passage of the act of March, 1848, "securing to married women their separate estates, and for other purposes," a decree of an orphans' court for the distributive share of a married female distributee, should be in the names of the husband and wife, for the use of the wife. *Fagan's Adm'r* v. *Fagan's Distributees*, 336
3. A marriage solemnized in accordance with our statute, between parties capable of contracting, with their free, full and mutual consent, is complete, without cohabitation, and entitles them respectively, to all the rights incident to that relation. *Potier and McCoy* v. *Barclay and Husband*, 439
4. When a marriage is contracted and solemnized in good faith, the subsequent refusal of the wife to live and cohabit with the husband, will not work a forfeiture of her right to dower, at his death, in the lands, of which he was seized during the coverture. *Ib.* 439
5. The interposition of a trustee in a deed for the use of a married woman, where the property goes into her possession, and the deed contains no

MARRIAGE, &c.—CONTINUED.

words of exclusion, cannot prevent the marital rights of the husband from attaching upon the property. *Lenoir* v. *Rainey*, 667

See Husband and Wife, 2, 3, 4, 5.

See Separate Estates of Married Women, 1, 2.

MISTAKE OF LAW.

1. Where one with full knowledge of all the facts constituting his title to land, purchases it of another, or compromises a controversy in reference to it, and acts on the presumption that he has no title, the mistake, if one is made, is of law, and not of fact. *Haden* v. *Ware*, 149

4. To authorize a court of equity to interfere, and grant relief for a mistake of law, the mistake must be so gross, and palpable, as to superinduce the belief, that some undue advantage was taken of the party, from imbecility of mind, or the exercise of improper influence. *Ib.* 149

MORTGAGOR AND MORTGAGEE.

1. Where two mortgagees, one of whom has a mortgage on a part only, and the other on the whole, of the property named in the bill, join as complainants, the bill is not multifarious. *M. and C. P. R. R. Co.* v. *Talman and Ralstons*, 472

2. J. B. M., being fully authorized in that behalf by the M. and C. P. R. R. Co., and A. and G. R., enter into a written agreement, by which A. and G. R. engage to act as the agents of said company, and to purchase in England, pay for, insure, and ship to said company, at Mobile, a certain quantity of rail road iron, &c.: and the said company, in consideration thereof, undertake to pay the said A. and G. R. for the same, on its arrival at Mobile, &c., and to secure said payment, "pledges the real and personal estate of said company," to the said A. and G. R. Held—1. That the agreement constitutes an equitable mortgage in favor of A. and G. R. on all the real and personal estate of said company, which a court of chancery will enforce against said company, and all persons claiming under it with notice. 2. That neither the fact, that the agreement pledges the real and personal estate of said company, without specification, nor that the amount to be secured is not stated, nor that it is made to secure future advances, nor that no time of redemption is fixed, can, *per se*, render the agreement invalid. *Ib.* 472

3. If two mortgagees of the same property, file a bill to foreclose, a subsequent assignee of the property has no right to object, that the senior mortgagee yields his priority of lien to the junior mortgagee. *Ib.* 472

4. The complainant should not be delayed in proceeding to foreclose a mortgage, because there is a controversy among the defendants about the surplus, after satisfying the mortgage. *Fry* v. *Mer. Ins. Co.*, 810

NON-SUIT.

1. To enable a party to revive a judgment of the court, by which he was compelled to submit to a *non suit*, it is not necessary it should appear in the judgment entry, that the *non suit* was taken in consequence of the judgment of the court, on a matter of law arising in the cause. It is sufficient, if the matter appears in a bill of exceptions. *Shields* v. *Byrd*, 818

NOTARY PUBLIC.

1. A notary public, who receives his appointment and commission from the governor of the state, on the recommendation of the judge of the county court, is a public officer of the county. *Governor* v. *Gordon*, 72

NOTICE.

1. The plaintiff is not confined to the proof of the demand, at the time stated in the notice. Proof of demand at any time after the receipt of the money by the sheriff, and before the motion, will be sufficient. *Evans* v. *Bank of the State et al.* 81
2. A vendor of land, unless notified of the pendency of a suit, against the vendor for its recovery, and required to defend it, is not concluded by a judgment of eviction therein. *Graham et als.* v. *Tankersley*, 634
3. Notice to an agent, appointed by the vendor of land, to receive and collect a note, executed for the purchase money, of the pendency of a suit, by a third person, against the vendee for the recovery of the land, is not notice to the vendor. *Ib.* 634
4. When the notice sent up with the writ of error, is dated the day previous to the suing out of the writ of error, this court will intend that it is a clerical misprision, and will consider the writ of error amended. *Shields* v. *Byrd*, 818

See Evidence, 12.

See Sheriff and Sureties, 4, 5.

NUDE PACT.

1. If a creditor agrees, with his debtor, to accept, in discharge of the debt, a less sum *in money*, than the debtor owes, on an over-due note, and the latter pays the sum of money so agreed, but the note is not delivered up, it is a *nude pact.*, and cannot bar a recovery of the balance due on the note. *Pearson and Fant* v. *Thomason*, 700

ORPHANS' COURT.

1. An order, or decree, of the orphans' court, accepting the resignation of an administrator, and directing him "to pay over to his successor, when known, the sum of $2696 84, being the amount due from him to said estate," is not such a final decree, as will protect the adminisrator against a citation for a a final settlement of the estate, by the distributees of the estate, although he had paid over to his successor, the sum ascertained by the previous decree, to be due from him. *Ashley's dis.* v. *Ashley's adm'r*, 15

ORPHANS' COURT—CONTINUED.

2. A decree of an orphans' court, which ascertains the interest of the several distributees of an estate, and directs their respective distributive shares to be set apart by commissioners, is such a final decree, as will authorize the revision of it on error. *Andrews, adm'r,* v. *Hall et al.* 85

3. When in the distribution of an estate in the orphans' court, it is made to appear, that an infant has been advanced, but not to the full amount of what would be its distributive share, the guardian *ad litem* of the infant, with the concurrence of the court, has the power to elect, and to bring such advancement into hotchpot. *Ib.* 86

4. In the settlement of an estate in the orphans' court, the court has no power to allow the set-off of a debt, due to the estate, by one of the distributees, against the share of such distributee. *Bondurant, adm'r,* v. *Thompson's distributees,* 202

5. Previous to the statute of 1839, authorizing administrators to rent the lands of their intestates, the orphans' court had no power to compel an administrator to account for the rent of land of the estate, received by him. *Ib.* 202

6. When the orphans' court, in a matter of concurrent jurisdiction, has taken cognizance and proceeded to a final decree, a court of chancery will not interfere, unless the bill alleges some *special* reason for its interposition. *King and Ansley, adm'rs,* v. *Smith and Steele,* 264

7. Where a petition for final settlement and distribution of an estate is filed in the names of the widow and other distributees of the deceased, it is not error to refuse to dismiss it on motion of the widow alone. *Green, adm'r,* v. *Distributees of Fagan,* 335

8. A decree rendered by an orphans' court, in favor of an infant distributee, should be in his name, by his guardian, if he have one, but if it be in his name alone, without the intervention of a guardian, it is not reversible on error. *Ib.* 335

9. Where the decree of an orphans' court in favor of an infant distributee, without the intervention of a guardian, directs execution to issue thereon, the award of execution is erroneous. *Ib.* 335

10. Since the passage of the act of March, 1848, "securing to married women their separate estates, and for other purposes," a decree of an orphans' court for the distributive share of a married female distributee, should be in the names of the husband and wife, for the use of the wife. *Ib.* 336

11. When the jurisdiction of the orphans' court is apparent upon the record, all reasonable intendments in favor of the regularity of its decrees will be made; it will therefore be intended, that a guardian of infant distributees resides within this state. *Key, adm'r,* v. *Vaughn and wife,* 497

12. It is not necessary, under the act of March, 1848, securing to married women their separate estates, that a trustee should be appointed for the wife, to receive her distributive share of an estate to which she may be

ORPHANS' COURT—CONTINUED.

entitled duriug coverture. Although she may object to its reception by the husband, and ask the appointment of a trustee, if no such objection is made, the husband may receive the property of the wife as trustee, and be held to account accordingly. *Ib.* 497

13. A decree in favor of husband and wife, and guardian and ward, jointly, is erroneous, but may be amended in this court, at the costs of the plaintiff in error. *Ib.* 498

14. The omission of the orphans' court to give notice, by publication, to a guardian, who has removed from the state, to file his accounts and vouchers for final settlement, is a fatal error, unless it is cured by the voluntary appearance of the party. *Croft* v. *Terrell et als.* 652

15. A decree of the orphans' court, against a guardian, which adjudges to the wards *jointly*, the aggregate sum found in his hands, is erroneous. It should designate the interest of each ward separately. *Ib.* 652

16. A final settlement made by a guardian with the orphans' court, shewing the amount of his indebtedness to his ward, is conclusive alike on the guardian and his sureties, unless they can impeach it for fraud. *Chilton* v. *Parks et al.* 671

17. Upon the application of a minor, who has arrived at the age of fourteen years, the orphans' court is authorized to appoint such guardian as the minor may elect, *without notice* to the guardian previously appointed. *Kelly* v. *Smith*, 687

18. Where the judge of an orphans' court is advised, that an injunction has been granted at the instance of the executor of an estate, to restrain the heirs and distributees from proceeding with a settlement begun in said court, it is a sufficient reason why he should suspend all further proceedings, as long as the injunction continues in force. *State* v. *Judge Orphans' Court of Macon*, 740

19. Where the judge of an orphans' court refuses to proceed in the settlement of an estate, should not an application for a *mandamus* be first made to the circuit court? *Quere. Ib.* 740

20. A report by an administrator of an estate, to the orphans' court, *that the estate was solvent, and that it would be of infinite benefit to the heirs of said estate, to sell, without delay, the real property of said estate*, does not confer jurisdiction on the court, to order a sale of the real estate, and a sale made pursuant to such order, does not divest the title of the heir. *Heirs of Bishop* v. *Hampton*, 761

21. The petition of an administrator for the sale of land, being lost, or mislaid, the testimony of the judge of the court cannot be received, that the petition was in fact different from the recital of it in the orders of the court, setting forth the grounds set forth in the petition, for the sale of the land. *Ib.* 761

See Error, 10.

PARTNERS AND PARTNERSHIP.

1. R & F, partners, having raised money by the acceptance of Bloodgood, placed in his hands for his protection, four bills of exchange, drawn for the accommodation of R & F, by B, C, E and H. Bloodgood was compelled to pay his acceptance, and the bills of B, C, E and H, were also dishonored. R then placed in the hands of an attorney, a large amount of notes on third persons, and gave written directions, that the money, when collected, was intended to secure Bloodgood, C, E and H, and two other persons who are mentioned, B, the drawer of the other bill, who was not mentioned, having claims of R & F in his hands, on which he claimed a lien for his protection, and which he subsequently delivered up to Bloodgood, upon an understanding with him, that he was not to be held responsible on his bill. The attorney collected a portion of the money, and appropriated it according to the written directions, of which an account was rendered. Subsequently, Bloodgood brought suit against C, E and H, on the dishonored bills, and recovered a judgment against each, less than the amount of the bills, the account being present, and being made the basis of the judgment, which judgment was afterwards revived by *scire facias*. C afterwards filed his bill, alledging a loss by neglect of Bloodgood, and especially insisting upon an account by Bloodgood, of the claims received by him from B. Held, first, that the defendants to the suits at law, were concluded by the judgments at law, from opening the account in equity. Second, that as the accounts were all on one side, and not complicated, equity would not take jurisdiction on the score of account, a trial having been had at law, and no sufficient excuse being shown for the failure to defend there. *Cullum* v. *Bloodgoad, Ford et als.* 34

2. Each partner possesses an equal, and general power, in behalf of the firm, to pledge, exchange, or otherwise dispose of the partnership effects, for any, and all purposes within the scope of the partnership. One partner may assign property for the benefit of one, of several, or of all the joint creditors. Whether one partner can make a general assignment, of *all* the partnership effects, *quere*. *Ib.* 34

3. One partner cannot, without the consent of his co-partner, appropriate the assets of the firm to the payment of his individual debts, and such appropriation, if made with a knowledge on the part of the person receiving them, that they are the joint property of the firm, is no bar to an action instituted against him by the partnership. *Burwell & Clarke* v. *Springfield*, 273

4. R. & M., partners in a house of entertainment, called on a person to make out an account current from the books, in the presence of the parties, and agreed verbally, that they should settle by the balance found by him; and if they could not agree upon the balance found by him, then they should call in two other persons to adjust the matter, and the party against whom the balance should be found, should pay it to the other. One of the partners refused to abide by the agreement, but the other proceeded, and had

PARTNERS, &c.—CONTINUED.

the account stated. Upon this account he sued the other: Held, there could be no recovery, although proof was made that the account was correctly stated from the books. *Morrow* v. *Riley*, 710

5. When a bill of exchange has been accepted by two persons, as partners, who at the maturity of the bill, have dissolved their partnership, and are also absent from Mobile, the place of their residence, a demand of payment made of an agent of one of the partners, is sufficient. *Brown* v. *Turner*, 832

PATENTS AND PATENT RIGHTS.

1. When a patent issues to one, reserving the title of all others, whether legal, or equitable, derived from W. & Co., a court of equity will subject the legal title to a superior equitable title derived from W. & Co. *Haden* v. *Ware*, 149

2. Where O sells to B a circular saw, with the understanding, that if B is compelled to pay, for the patent right to use it, such payment shall be borne by O: and the agent of one, who claims to be the patentee of the saw, demands of B the price of the patent right, which B voluntarily pays, it is a good defence, in a suit by O against B, for the purchase money of the saw, if B proves that the patent to which he yielded, covered the saw. *Orr* v. *Burwell*, 378

3. Whether, or not, a particular saw is embraced by a patent, is a question of fact, not of law, and the determination of it, is properly referred to the jury. *Ib.* 378

PAWN, OR PLEDGE.

1. If a slave is pledged for the payment of a debt, the pawnee is accountable for the profits of the labor of such slave, in the absence of any agreement to the contrary. *Geron* v. *Geron*, 558

2. If, in case of a pawn or pledge of a slave, the hire discharges the debt for which it was pledged, the pawnor is entitled to have it restored to his possession, and may recover it by action at law, or defend his right to the possession, if sued by the pawnee. *Ib.* 558

3. H. lent his note for $200 to S, receiving from the latter, horses, in pledge for his indemnity. S. afterwards lost the note at gaming, and notified H. of the fact—Held, that although H. was not bound to surrender the horses, whilst the note, without his fault, was outstanding, yet if after notice of the loss of the note, H. undertook to determine between him, and the holder of the note, and decided in favor of the latter, without being compelled to do so by suit, he acts at his peril, and must sustain the loss. *Whitlock* v. *Stewart et als.* 601

PAYMENT.

1. Whether, or not, the transfer of a note, in consideration of a pre-existing debt, is an absolute payment, is a question of fact, to be determined by the jury. *Fulford* v. *Johnsom, Hendon & Co.*, 386

PAYMENT—CONTINUED.

2. If a note for more than $50, is indorsed and delivered by the holder to a third person, suit must be brought against the maker, to the first circuit or county court, to which he can be sued, next after the maturity of the note; and if the indorsee remits a part of the demand, so as to bring it within the jurisdiction of a justice of the peace, a suit in a justice's court, though prosecuted to a return of no property, is insufficient to charge the indorser. *Ib.* 386
3. The acceptance, by a party, of a portion of his demand against another, without any agreement to release the balance, is not a waiver of his right to insist upon the payment of such balance. *University* v. *Walden*, 655
4. A credit indorsed on a note by the plaintiff, which is beneficial to him, and prejudicial to the defendant, is not of itself admissible evidence for the former, and should be excluded from the jury. *Sorrell* v. *Craig*, 789

See Action, 1.

PLEADING IN CHANCERY.

1. One person being the executrix of R. H. and the administratrix of Richard H. his son, the latter estate being indebted to the former, a bill is not multifarious, which makes her a party, and unites a claim against both estates, although a claim is also asserted against her as due from Richard H. to R. H. She was a necessary party to protect the interest of the former. *Hunley et al.* v. *Hunley*, 91
2. An averment in an answer to a bill, filed for relief against the stockholders of a chartered company, "that the company has no real, or personal property, out of which their executions can be satisfied," is a sufficient allegation of insolvency, to let in the defence of an equitable offset. *Goodwin et al.* v. *McGehee et al.* 232
3. It is sufficient in equity pleadings, if the facts which constitute the defence relied upon, are stated, to entitle the party to the appropiate relief, though a wrong name be given to the defence set up. *Ib.* 233
4. The complainant must make out the title to the relief which he seeks by his bill, or to some relief consistant with its allegations. The defendant is only required to rebut the plaintiff's equity, and may rely upon matters purely legal, if connected with the matter of the bill for his defence; and may, by a cross bill require the plaintiff to answer thereto.—*Ib.* 233
5. Misrecitals in a supplemental, of the allegations in an original bill, can not change the character of the relief sought by the latter. The two must be taken together, as constituting but one bill. *Potier and McCoy* v. *Barclay and Husband*, 439
6. When a widow files her bill to have dower allotted her, and during the pendency of the suit, intermarries, it is not error to make her husband a co-complainant. *Ib.* 439
7. Where two mortgagees, one of whom has a mortgage on a part only, and

PLEADING IN CHANCERY—CONTINUED.

the other on the whole, of the property named in the bill, join as complain ants, the bill is not multifarious. *M. and C. P. R. R. Co.* v. *Talman aud Ralstons*, 472

8. Where a bill, after alledging, that the M. and C. P. R. R. Co. was indebted to the A. L. Ins. and Tr. Co., and that the former executed to the latter, a note and mortgage, to secure the payment of said indebtedness, avers, that the complainant "is the assignee of the said A. L. Ins. and Tr. Co. of the said indenture of mortgage, and the said promissory note, and entitled to all their rights and remedies, therein and thereupon," &c., this is a sufficient averment of title in the complainant. *Ib.* 472

9. Where an agreement is entered into between A. and G. R., and the M. and C. P. R. R. Co., by which A. and G. R. engage to purchase, pay for, insure, and ship to said company at Mobile, a certain quantity of rail road iron, &c. as a condition precedent to the liability of said company, in a bill filed by said A. and G. R. against the said company, to enforce said agreement, it is averred, "that there is now due to them from the company, the sum of $7,000, and upwards, accruing to them under the contract, and that they proceeded to purchase the iron, and furnished it to the company, according to the stipulations of the contract, having advanced the money therefor," this is a sufficient averment of performance. *Ib.* 473

PLEADING AT LAW.

1. An allegation in a declaration, "that the notary, *at, &c., aforesaid*, made diligent search, and inquiry for the said acceptor," is a sufficient allegation, that inquiry and search was made in Mobile, it having been previously alleged, that the bill was directed to Charles Byram, Esq., Mobile. *Hazzard* v. *Shelton*, 62

2. A plea which sets out the consideration of the contract sued on, but does not aver wherein the consideration is insufficient, is no answer to the declaration, and a demurrer to it is properly sustained. *Mead* v. *Hughes's Adm'r*, 141

3. A plea which sets up an agreement between the parties in bar of the action, without stating the terms of that agreement, is defective, and it is not error to strike it out on motion. *Ib.* 141

4. When a breach of the condition of a bond is specially assigned, a general plea of conditions performed, is bad—the plea should set out the mode, and manner of the performance. So to such an assignment, a general plea of discharge is bad—every fact showing the legality of the discharge, should be averred. *Tait* v. *Parkman and Weaver*, 253

5. Where an agent declares *in the common counts*, on a promise made to him for the benefit of his principal, the plea of non-assumpsit puts in issue the right of the agent to maintain the action in his own name. *Nabors* v. *Shippey*, 294

6. An averment in a declaration on an irregular indorsement, that suit was

PLEADING AT LAW—CONTINUED.

commenced against the maker, "in the county, where he ordinarily resided, but that he could not, on diligent search and inquiry, there, and elsewhere, in said State, be found," is not an averment of such diligence as will charge the indorser. *Fulford* v. *Johnson, Hendon & Co.* 385

7. An averment in a declaration on an irregular indorsement, that the maker was at the time of the indorsement of the note, and has continued since, a non-resident, and that the fact of his non-residence was at the time unknown to the plaintiff, is an insufficient averment to charge the indorser. *Ib.* 385

8. The want of profert, in a declaration of the instrument sued on, could only be reached at common law by special demurrer, and, since the passage of the statute requiring all demurrers to be general, a defect, that before could be reached in no other way than by special demurrer, is cured, and cannot be assigned as cause of demurrer. *Strange* v. *Powell,* 452

9. When pleas are pleaded in the court below by name merely, which the court, on motion of the plaintiff, orders to be stricken out, in the absence of any thing in the record, going to show, that form was waived, and the plaintiff here insists on the objection, this court cannot regard them as pleas, and will not reverse the action of the court below, although such pleas, if they had been pleaded in due form, might have constituted a bar to the action. *Ib.* 452

10. A plea of *ne unques executor*, is a plea in bar, not in abatement, and puts the plaintiff on proof of his representative character, without being verified by affidavit. *Sorrell* v. *Craig, adm'r,* 789

11. In declaring on a contract, the declaration must show a binding agreement between the parties, and that it has been violated by the defendant. *Jones* v. *Powell,* 824

12. If a valid contract is shown, and the promise of the plaintiff to do a particular thing, as the same is the inducement to the promise of the defendant, the plaintiff must aver a readiness to perform the contract on his part. *Ib.* 824

13. If a defendant wishes to impeach the *factum* of the assignment, of a note sued on, to the plaintiff, he must annex to his plea, denying the assignment, an affidavit, that he verily believes the assignment is forged: or he must make oath to that effect in open court. *Bancroft* v. *Paine,* 834

14. An affidavit merely verifying a plea, "that the note was not at any time endorsed and delivered to the plaintiff, nor had he any equitable or legal interest in it, at the commencement of the suit, or at any time before," is insufficient, and a demurrer, to a replication to such plea, should be visited upon the plea. *Ib.* 834

See Demurrer, 1.

See Sixteenth Section, 2, 3, 4.

See Slander, 4.

PRACTICE AT LAW.

1. The continuance of a cause is a matter of discretion with the primary court, and is not revisable on error. *Lindsay and Atkinson* v. *State*, 44
2. Where the holder declares upon one of a set of exchange, it is not necessary to account for the non-production of the rest; any ground of defence which may arise in reference to another of the set, it devolves on the defendant to make. *Hazzard* v. *Shelton*, 62
3. If a plaintiff in attachment, after a garnishee has answered, disclosing the fact, that the demand sought to be condemned has been transferred, suffers several terms to elapse without taking the proper steps to bring the transferee into court, to contest with him the validity of the transfer, it is not error in the court to discharge the garnishee. *Mock* v. *King*, 66
4. The circuit court has no power to direct an amendment of a judgment *nunc pro tunc*, after such judgment has been affirmed on certificate in the supreme court; and a writ of error will lie to this court, upon the judgment of the court ordering such amendment. *Stephens* v. *Norris, Stodder & Co.* 79
5. Where the plaintiffs in a cause, to whom a deed of mortgage had been executed, and which remained unsatisfied, in answer to interrogatories propounded to them under the statute, state, that the deed is in the hands of S P S, their attorney, and S P S being examined as a witness, deposed that it has not been in his possession for the last five or six months, and a notice to produce it on the trial, is shown to have been duly served on R S, another attorney, who had succeeded S P S in the management of the cause—these facts constitute a sufficient predicate for the admission of secondary evidence at the instance of the defendant, the deed not having been produced. *Bright & Ledyard* v. *Young et al.* 112
6. Where a deed is not produced after due notice to the party having the control of it, the court will be liberal in the application of the rule, which allows secondary evidence; and though there be no direct evidence of the identity and execution of the deed, proof of circumstances, tending to establish these facts, is admissible, and proper to be submitted to the jury. *Ib.* 112
7. The court will not interfere in a summary way by motion, and set aside a sale of land made under execution, upon the ground of the invalidity of the title of defendant in execution, but will leave the party to defend his possession in the ordinary way, when the purchaser asserts his right.—*Nuckols* v. *Mahone*, 212
8. The withdrawal of a plea, and the substitution of others by a defendant, is a matter of discretion with the primary court, and not revisable on error. *Graham and Taylor, adm'rs*, v. *Chandler et al.* 342
9. Where a defendant, in an action of trespass to try titles, in which a judgment has been rendered against him for the recovery of the land, and damages for its occupancy, sues out a writ of error, and dies, the suit

PRACTICE AT LAW—CONTINUED.

must be revived in the names of the heirs and personal representatives of the deceased. *Jordan* v. *Abercrombie and Thompson*, 580

10. The proper course for a plaintiff to pursue, where the defendant pleads at the same time in abatement, and in bar, is to move to strike out the former, or to treat it as a nullity. *Hart* v. *Turk*, 675

11. A motion to strike out a plea, is addressed to the discretion of the court, and its refusal, is not a subject of revision in this court. *Williams* v. *Hinkle et als.* 713

12. Where a suit is instituted on an administration bond, against the administrator and his sureties, each may sever, and plead as many pleas as he may deem necessary to his defence. *Ib.* 713

13. Where a plea pleaded by its name, is received in short, by the other party, no objection can be taken to it, in this court, for not being in proper form. *Todd* v. *Todd*, 743

14. Is it not too late, after a cause is before the jury, on issues joined, to relieve the plaintiff from the proof of facts, which he has voluntarily assumed the burden of proving?—*quere*. *Sorrell* v. *Craig*, *adm'r*, 789

15. It is not permissible for a court to vacate a judgment or decree, rendered by it, at a previous term, unless authorized to do so by legislative enactment, or by a practice so often sanctioned, as to establish it. *Crothers* v. *Ross's dist.*, 800

16. A petition for a *supersedeas* of an execution is regarded, under our practice, in the nature of a statement, or declaration of facts, and when demurred to, if the demurrer is overruled, and the respondent declines to answer over, the court may take the facts as admitted, and render judgment thereon. *Powell* v. *Washington & Brock*, 803

17. That a party employed counsel to conduct the defence of his case, who was compelled by family affliction, to leave the court before the cause was reached, is not a ground upon which a judgment can be vacated in a court of law, after the term at which it was rendered. *Ib.* 803

18. The holder of a note, endorsed in blank, *may* fill up the endorsement with the name of the endorsee. *Bancroft* v. *Paine*, 834

19. If the plaintiff is invested with the legal title to a note sued on, *it is unnecessary* to fill up the blank endorsement, although the declaration describes it as endorsed to the plaintiff. *Ib.* 834

See Demurrer to Evidence.

PRACTICE IN CHANCERY.

1. A recognition in the bill, of the liability of the complainant to pay the amount actually due, and lawful interest, and a submission to pay this sum as the court shall direct, invests the court with jurisdiction to render a decree against him, for the proper amount. *Branch Bank at Mobile* v. *Strother*, 51

PRACTICE IN CHANCERY—CONTINUED.

2. It is no ground for a reversal, that a reference to the master was prematurely made. *Ib.* 52
3. The objection cannot be taken for the first time at the hearing, that one was improperly made a defendant, he having answered fully, tendering issues both of law and fact. No decree having been rendered against him, his having been a party, cannot affect the decree made against another defendant. *Hunley et al.* v. *Hunley*, 91
4. The omission of a party to assert a fact material to his defence, which is within his knowledge, though it may not deprive him of the benefit of testimony taken to establish the fact, is a reason for requiring more stringent proof. *Goodwin et al.* v. *McGehee et al.* 233
5. After the lapse of seven years, from the time of filing an answer, it is not error in the chancellor to refuse to permit an amended answer to be filed, making an entirely new case, when by the exercise of ordinary diligence, the facts set forth in the amendment might have been ascertained in proper time. *Ib.* 233
6. The master, when directed to ascertain the facts of a case, may receive the testimony of witnesses pertinent to such facts, without an order expressly directing him to that effect. *Ib.* 233
7. It is error to admit in evidence the copy of a deed, without accounting for the absence of the original, or giving notice to the adverse party to produce it. *Potier and McCoy* v. *Barclay and Husband*, 439
8. A person authorised by a commission to take the testimony of a witness is *pro hac vice* an officer of the court, as such, is invested with the authority to swear the witness. *Ib.* 439
9. An objection to a deposition, that the commissioner, who was not a judicial officer, swore the witness, if there was any force in it, comes too late, when made for the first time at the trial. *Ib.* 439
10. There is no error in refusing to suppress a deposition, because the commissioner who took it, is a partner of the solicitor of the party in whose behalf it was taken, when it appears that said commissioner is not retained in the cause, and has never had any interest in it. *Ib.* 439
11. The objection of multifariousness, cannot be made for the first time in this court. *M. and C. P. R. R. Co.* v. *Talman and Ralstons*, 472
12. Where one of several trustees, who have been made defendants to a bill, dies, and another person, *by consent in court*, is substituted in his stead, the irregularity, if there be any, is waived; and if said substituted party appears by attorney, and fails to answer, a decree *pro confesso* may be taken against him, notwithstanding he may not have been served with process. *Ib.* 472
13. If two mortgagees of the same property, file a bill to foreclose, a subsequent assignee of the property has no right to object, that the senior mortgagee yields his priority of lien to the junior mortgagee. *Ib.* 473

PRACTICE IN CHANCERY—CONTINUED.

14. If a bill is wanting in equity, the chancellor may dissolve the injunction, in vacation, after the coming in of the answer, notwithstanding all its allegations are therein admitted. *Nelson & Hatch* v. *Dunn et als.* 501
15. Where on a bill, filed for a foreclosure, it is referred to the master to take and state an account, it is error in the chancellor, to make a final order for the sale of the property before the report of the master comes in and is confirmed. *Graham et als.* v. *King*, 563
16. A father made a deed, conveying three slaves, in trust to a third person, for his children, and afterwards sold two of the slaves. The children filed a bill against the purchaser, and made the father a party defendant, as to whom the bill was taken *pro confesso.* Held, that although the bill was dismissed against the purchaser, the deed not having been acknowledged, in open court, it should have been retained against the father, and a trustee appointed for the remaining slave, still in the father's possession.—*Foster et al.* v. *Mitchell et al.* 572
17. It is not error in the chancellor to refuse to decree upon proof, which is not responsive to any of the allegations in the pleadings. *Graham et als.* v. *Tankersley*, 634
18. As a general rule, in chancery proceedings, the costs may be taxed upon either party, at the discretion of the court, but it must be a legal discretion, exercised in accordance with general rules, and former precedents. *Gray* v. *Gray*, 779
19. Upon a bill to foreclose a mortgage, where there are infant defendants, it is error to decree a sale of the property, without a reference to the master to ascertain, how much of the property it was necessary to sell, to satisfy the mortgage. *Fry* v. *Mer. Ins. Co.*, 810
20. In the mode of offering the property for sale, the interest of all the defendants should be consulted. *Ib.* 810

PRINCIPAL AND AGENT.

1. *A verbal promise*, made to an agent, to pay the amount of an execution, in favor of the principal, which has been levied on property of the defendant, in consideration that the agent will release the levy, does not authorize an action against the promissor, in the name of the agent. *Nabors* v. *Shippey*, 293
2. Where an agent declares *in the common counts*, on a promise made to him for the benefit of his principal, the plea of non-assumpsit puts in issue the right of the agent to maintain the action in his own name. *Ib.* 294
3. Where an agent receives money for his principal, to which a third person is entitled, and pays it over to the former, before demand, or notice, from the latter, such payment discharges the agent from all liability. *Upchurch* v. *Norsworthy, adm'r*, 705
4. An agent, to whom a note, endorsed in blank, has been transmitted for collection, may sue on it, in his own name. The principal alone has the right to object to it. *Bancroft* v. *Paine*, 834

PRINCIPAL AND SURETY.

1. A surety who pays a debt for his principal, six months after his estate has been declared insolvent, may file his claim against the estate, within six months afterwards, if final settlement has not been made, although the creditor had not filed the claim against the estate. *Powe and Smith, adm'rs*, v. *Executors of Tyson*, 221
2. A direction by the plaintiff to the sheriff, without consideration, to stay proceedings on an execution against the principal debtor, does not discharge the surety from the payment of the debt. *Royston, adm'r*, v. *Howie*, 309
3. The creditor is not estopped from showing the truth of the matter, because he may, under a mistaken view of his legal rights, have said that the arrangement made with the principal had discharged the surety.—*Ib.* 309

PROCESS, AND SERVICE OF.

1. An officer in the execution of process, issued on a judgment in trover, which commands him to demand, and take from the possession of the defendant certain property therein specified, has no authority to take such property from the possession of a third person, and if he does so, can claim no protection under the process. *Lyon* v. *Goree*, 360
2. If an officer in the execution of process, goes beyond its mandate, and takes property from the possession of a stranger, he can only defend himself by showing a better title in himself, or in him for whom he acts.—*Ib.* 360

RECEIPT.

1. The genuineness of a receipt being in issue, the court charged the jury, "that if the evidence, although it preponderated in favor of the receipt being genuine, still, if upon a fair and full examination of it, their minds were left in a state of doubt, and uncertainty, as to its being genuine, they should find in favor of the plaintiff upon that point:" held, that this charge could not be supported, as the jury were authorized to infer, that *demonstrative* evidence was required, and that *moral* evidence was insufficient. *Hopper, adm'r*, v. *Ashley*, 457

RECOGNIZANCE.

1. A recognizance, by which the recognizors stipulate that the principal shall appear and answer to a charge of conspiracy, is sufficient, although it does not designate in the terms of the indictment, the particular act which he conspired to do. *Hall et als.* v. *The State*, 431
2. A judgment *nisi*, on a forfeited recognizance, which does not specify the charge, that the principal recognizor was called to answer, is insufficient to support a judgment final. *Ib.* 431
3. A *scire facias*, on a forfeited recognizance, is a mere notice to the recognizors to show cause why the judgment *nisi* should not be made final, and

RECOGNIZANCE—CONTINUED.

a discontinuance as to any one or more of the parties, will not operate a discontinuance as to all. *Ib.* 431

4. Where two writs of *scire facias*, on a forfeited recognizance, are returned, *nihil*, by the sheriff of the county, in which the recognizance was entered into, it is equivalent to a service; but two such returns, by the sheriff of a different county, will not have the same effect. *Ib.* 431

5. A recognizance, taken by the court, in which the indictment is found, simultaneously with an order changing the venue to another county, and which is conditioned for the appearance of the accused, to answer the charge, at the ensuing circuit court of the county, to which the cause is transferred, is not liable to objection on that account. *Ib.* 431

6. A recognizance taken by a sheriff from a defendant, whom he has arrested, under a *capias*, on a charge of felony, is void. *Governor* v. *Jackson*, 703

RECORD, EXEMPLIFICATION OF.

1. Where the judicial certificate, to an exemplification of a judgment, rendered in the circuit court of Noxubee county, in the state of Mississippi, recites, "I, A B D, presiding judge of the fourth judicial district of the state of Mississippi, which said district, includes the county of Noxubee," do certify, &c: it is a sufficient compliance with the act of Congress, to admit the transcript in evidence. *Geron* v. *Felder*, 304

2. A digest of the laws of a state, which does not appear to have been published by authority of law, is inadmissible as evidence to establish the rate of interest of such state. *Ib.* 304

3. A power of attorney, acknowledged before one professing to be a justice of the peace in Arkansas, with a certificate of the clerk of the probate court of the county, as to the official character of the justice of the peace, and of the acknowledgment, and registration of the power of attorney, is not sufficiently authenticated, either at common law, or under the act of Congress. *Key, adm'r*, v. *Vaughn and wife, et al.* 497

4. The certificate of a judge to the exemplification of a record of another State, that the attestation of the clerk "is in due form," is sufficient to admit such exemplification in evidence, notwithstanding the judge may not certify, *in so many words*, to the official character of the clerk. *Linch* v. *McLemore, adm'r*, 632

RIGHT OF PROPERTY, TRIAL OF.

1. Property being levied on by virtue of an execution against the executors of L, and claimed by D, in virtue of a trust executed to him by L, in his life time, a plea by the claimant, that the estate of L had been declared insolvent, and that the judgment on which the execution had issued, had not been filed in the office of the clerk of the orphans' court, within six months after the decree of insolvency, and that on the settlement of the estate, the claim was rejected for that cause, is bad. *Dent* v. *Smith*, 286

2. A claimant in the trial of the right of property, who derives his right from

RIGHT OF PROPERTY, &c.—CONTINUED.

a deed of trust in which he is a trustee, must rely on the title thus derived, and will not be permitted to prove, that independent of the deed of trust, and long before it was created, his *cestui que trust* was the owner of the property conveyed by the deed, by gift from the donor. *Ib.* 286

3. When a trial of right of property has been had, it cannot be assigned for error, that no issue in writing was made up previous to the trial. *Ib.* 286

4. Where a claim against the estate of S. F., is contested by his administrator, a judgment against S. F. sen. and S. F. jun., in favor of the plaintiffs, is sufficient to establish the claim, unless a doubt is created, by proof adduced on the part of the administrator, as to the identity of the demand with either of the defendants to the judgment. *Linch, use,* v. *McLemore, adm'r,* 632

See Execution, Writ of, 3.

ROADS AND REVENUE, COURT OF.

1. The commissioners' court of roads and revenue of a county, is the proper defendant in a controversy involving the legality of its proceedings in the establishment of a new road, and a writ of error will lie in such case in the name of said court. *Com's of Talladega Co.* v. *Thompson,* 134

2. A judge of the circuit court in this state has the power to grant writs of *certiorari*, returnable to said court, to correct the errors of the commissioners' court of roads and revenue in the establishment of a new road, and take cognizance thereof. *Ib.* 134

3. The record of a court of limited jurisdiction, should contain every fact essential to the validity of its judgment, and when in the record of the commissioners' court of roads and revenue in reference to the establishment of a new road, it does not appear, that thirty days' notice of the application had been given, a decree establishing such road is erroneous, and properly quashed at the instance of a party injured thereby. *Ib.* 134

4. A judge of the circuit court, has the power to grant a writ of *certiorari*, returnable to said court, to correct the errors of the commissioners' court of roads and revenue, in altering and changing a public road, and to take cognizance thereof. *Barnett et als.* v. *The State, ex rel.,* 829

5. The record, of a court of limited jurisdiction, must contain every fact, essential to the validity of its judgments, and when, in the record of proceedings of the commissioners' court of roads and revenue, in altering and changing a public road, it does not appear, that thirty days' notice of the application had been given, a decree, altering and changing such road, is erroneous, and is properly quashed. *Ib.* 829

SALES.

1. An instrument which acknowledges the payment of the consideration for certain personal property therein described, though in form a receipt, is in effect a bill of sale. *Bush* v. *Bradford,* 317

2. If a bill of sale of blooded stock contains no warranty, express or implied,

SALES—CONTINUED.

beyond that of title, parol evidence is inadmissible to add to it a simultaneous verbal warranty as to age and soundness. *Ib.* 317

3. Where testimony is introduced by a defendant, tending to prove false representations by the plaintiff, in a sale of blooded stock, as to age and soundness, it is competent for the plaintiff to repel the presumption of fraud, to show that he informed the defendant, after the sale, of an error in his representations, and offered to take back the property, which offer the defendant rejected. *Ib.* 317

SALES UNDER JUDICIAL PROCESS.

1. An execution issued on a judgment, after the death of the plaintiff, is void, and a sale of land made under it, conveys no title to the purchaser. *Stewart* v. *Nuckols*, 225
2. A judgment was rendered against S. R., in favor of W. & C., upon which execution issued against S. R., which being levied on a slave, he gave a forthcoming bond for its delivery, with B. as his surety. The judgment is described in the bond as having been rendered against S. R. and B., and being returned forfeited, and an execution having issued thereon against S. R. and B: held, that the discrepancy between the bond and the execution was so great, that no execution could issue upon it, and that a sale of land made under it, would be set aside. *Nicolson* v. *Burke*, 353
3. If an execution, on a judgment, against a sole defendant, issues, after his death, it is a nullity, and a sale under it, of land, which the defendant, in his life time, had fraudulently conveyed to a third person, vests no title in the purchaser. *Hurst & Shipp* v. *Weathers*, 417
4. A court of law is competent to control the acts of its officer in the execution of its process, and, when satisfied, that a sale, made under it, is affected with fraud, or that the officer has been guilty of an irregularity, to the injury of either party to the process, will set aside such sale. *Draine* v. *Smelser & Henderson*, 423
5. A sale of land will not be set aside, because made under several executions at one and the same time. *Ib.* 423
6. Where land of the value of $800, is sold by an officer under legal process for $400, in the absence of fraud and irregularity in the officer, the sale will not be set aside for inadequacy of price. *Ib.* 423

SCIRE FACIAS.

1. A *scire facias*, on a forfeited recognizance, is a mere notice to the recognizors to show cause why the judgmdnt *nisi* should not be made final, and a discontinuance as to any one or more of the parties, wil not operate a discontinuance as to all. *Hall et al.* v. *The State*, 431
2. Where two writs of *scire facias*, on a forfeited recognizance, are returned, *nihil*, by the sheriff of the county, in which the recognizance was entered

SCIRE FACIAS—CONTINUED.

into, it is equivalent to a service; but two such returns, by the sheriff of a different county, will not have the same effect. *Ib.* 431

3. Where a judgment is rendered against two defendants, and one dies, the lands of the survivor may be sold, under an execution, issued on such judgment, without its being revived by *scire facias*. *Martin* v. *Branch Bank at Decatur*, 587

SEPARATE ESTATES OF MARRIED WOMEN.

1. A deed made in Georgia, by which in contemplation of marriage, slaves are conveyed to trustees, in trust for the separate use of the wife, is not such an instrument, as is by law required to be recorded, on the removal of the property to this State. *Smith* v. *Ruddle et al.* 28

2. Where an antenuptial contract secures to a trustee, for the separate use of the wife, "all the property of every description, to which she is, or may be entitled by inheritance, or otherwise whatsoever," and the wife subsequently, by the death of an aunt and a sister, becomes entitled, as one of their distributees, to several slaves, which the husband receives the possession of, by virtue of a power of attorney from the trustee, and which, during his life, he acknowledges and recognizes as the separate property of the wife under the antenuptial contract, on the death of the husband, the right to such slaves does not vest in his personal representative, but survives to the wife. *Trippe, ex'r*, v. *John, adm'r*, 117

3. Where a wife, having the power, under an antenuptial contract, to convey her separate property by deed, in consideration of a provision made for her in the will of her husband, executes to M. A. T. and W. F. T., his children by a former marriage, a deed of "all the property that she held in her separate right," and which concludes with a stipulation, "that said property is hereby fully and freely incorporated with his (her husband's) estate, and all manner of contracts, settlements or legal hindrances to the attainment of that end are hereby waived, I reserving the right, as a consideration herefor, to become an equal heir in the estate of my husband with his children, who are the parties to the second part in this deed"—Held, 1. That the deed creates no interest in the husband or his personal representattive, but vests the property in M. A. T. and W. F. T. the children of the husband. 2. That the deed is supported by a sufficient consideration. 3. That the deed is not void for uncertainty in the description of the property. 4. That the delivery of the deed was a sufficient delivery of the property. *Ib.* 117

4. To create a separate estate in a married woman, a clear and manifest intention must appear, on the face of the instrument, to exclude the marital rights of the husband. *Pollard et al.* v. *Merrill & Eximer*, 169

5. The intervention of a trustee, in cases, where by the terms of the instrument, *the marital rights* of the husband are not excluded, and he is allowed the use and enjoyment of the property, will not convert his estate therein, into a mere equity. *Ib.* 169

SEPARATE ESTATES, &c.—CONTINUED.

6. A provision, in a marriage contract, which does not create a separate estate in the wife, in restraint of the husband's right to alienate the personal property therein embraced, is void. *Ib.* 170

7. A marriage contract, by which the personal property of the intended wife is conveyed to trustees, to have and to hold, "*for the separate and exclusive use, benefit and maintenance,*" *of her and her husband,* "*during their joint lives,* in no wise liable, or subject to him," the said husband, "or to the payment of any of his debts, or liabilities now, or hereafter existing," does not create a separate estate in the wife, but vests such an estate in the husband, as, when reduced to possession, is liable to execution at law.—*Ib.* 170

8. The equitable right of the wife to a settlement of her undivided distributive share of the estate of her deceased father, in the hands of his executrix, is a consideration sufficiently valuable, to support a deed to her from her husband, relinquishing such distributive share for her sole and separate use. *Bradford* v. *Goldsborough,* 311

9. Such a deed, although inoperative at law, will be enforced, in equity, against an execution creditor of the husband, who is seeking to condemn the property, for the satisfaction of his debt, after it has come to the possession of the wife. *Ib.* 312

10. It is not necessary, under the act of March, 1848, securing to married women their separate estates, that a trustee should be appointed for the wife, to receive her distributive share of an estate to which she may be entitled during coverture. Although she may object to its reception by the husband, and ask the appointment of a trustee, if no such objection is made, the husband may receive the property of the wife as trustee, and be held to account accordingly. *Key, adm'r,* v. *Vaughn and wife, et al.* 497

11. A decree for the interest of a married woman, in the distribution by the orphans' court, of funds in the hands of her guardian, should be in the names of the husband and wife, for the use of the wife. *Croft, guardian,* v. *Terrell et als.* 652

SET-OFF.

1. A set off in equity, in favor of a defendant, can only be had upon a cross bill filed by him, but when the defence is only in the nature of a set off in equity, by showing a discharge of the liability sought to be enforced, before the filing of the bill, there is no necessity for a cross bill. *Goodwin et al.* v. *McGehee et al.* 233

See Sheriff, &c., 13.

SHERIFF AND HIS SURETIES.

1. The landlord may maintain assumpsit against the sheriff, for money had and received, for rent due from the tenant at the time of the levy of an execution. *Thompson* v. *Merriman,* 166

2. The sheriff cannot set up, in bar of the action, or by way of off-set, a debt due from the landlord to the tenant. *Ib.* 166

SHERIFF, &c.—CONTINUED.

3. A sheriff has no power to sell land, and pass the title to a purchaser, after the return term of the writ, on which he made the levy, unless new process be issued to him for that purpose. *Morgan* v. *Doe ex dem. Ramsey*, 190
4. Where a sheriff, as administrator *ex officio*, neglects to collect notes, due the estate, until his term of office expires, he will not be chargeable with the amount thereof, if the makers of the notes were perfectly solvent, for a considerable time, after his administration ceased. *Bondurant, adm'r*, v. *Thompson's distributees*, 202
5. The sheriff is not responsible for postponing a sale of land, until it is too late to make another levy, and sale before the return day, if in good faith, and in the exercise of ordinary prudence, he was justified in supposing, the land would sell for a sum sufficient, to pay the execution in his hands. The rule, it seems, is otherwise, in the case of a levy on personal property. *Patterson* v. *Powell et al.* 205
6. A sheriff is not liable to the penalty, prescribed by the act of 1843, (Clay's Dig. 238, § 9,) in cases, where by statute he is required to perform certain services, for which no compensation is fixed, if he receives more than reasonable compensation for such services. *Chenault* v. *Walker*, 605
7. The true construction of the act of 1843, is, that a sheriff or other officer shall be liable to its penalty, when he demands and receives, other, or higher fees for services, the compensation for which is defined and fixed by law. *Ib.* 605
8. If a sheriff entertains real doubt, as to whether property, in the possession of a defendant, is liable to an execution in his hands, he may demand a bond of indemnity from the plaintiff, before levy made, and if the plaintiff, on such demand, refuses to indemnify him, he is not liable for failing to make the money on the execution. *McGehee* v. *Chandler et als.* 659

See Executors and Administrators, 10.

SIXTEENTH SECTION.

1. When, in an action upon a note given for the purchase of a 16th section, the defendant pleaded "that the contract of purchase and sale had been rescinded by a vote of the electors in said township, according to law," and the plaintiff replied that "he could not gainsay the plea of defendant," a judgment was rendered, dismissing the suit, upon the assumption of costs by the defendant, this is not such a judgment as can be pleaded as a *retraxit*, in bar of another action upon the same demand. *Hardy et als.* v. *Br. Bank at Montgomery*, 722
2. A plea, stating, "that the said contract of purchase and sale was rescinded by a vote of the electors in said township according to the provisions of the law," is bad for uncertainty. *Ib.* 722
3. A plea, stating "that the commissioners of said 16th section never gave him, the said Geo. W. Hardy, a certificate of purchase, nor a deed to said land," is bad, because not inconsistent with the validity of the contract of sale. *Ib.* 722

SIXTEENTH SECTION—CONTINUED.

4. A plea "*puis darrein continuance*," which states, "that since the last continuance of the cause, to wit, on the 6th of March, 1848, the legislature enacted that when all the notes given for any 16th section, have fallen due, and suits have been instituted thereon, or any one of them, and suit defeated by any plea avoiding the contract of sale, the contract of sale shall be considered as rescinded, &c.," and which goes on to allege that that plaintiff had sued the defendant in the circuit court of Lowndes, and "said suit was defeated by plea avoiding contract of sale," is bad, as stating only a legal conclusion, and tending to produce prolixity. *Ib.* 723
5. The authority conferred, by the 13th section of the act of the 6th March, 1848, "to regulate permanently the 16th section fund" is the exercise of a power beyond the functions of legislation, and is of consequence inoperative. *Ib.* 723
6. The vote of a majority of *all* the legal voters of a township, is necessary to authorize the rescission of a contract for the sale of 16th section land. The assent of a majority of the voters, is not sufficient. *Allen and Watkins* v. *The State Bank*, 788

SLANDER.

1. In an action of slander, exculpatory declarations, made by the defendant, subsequently to the speaking of the actionable words, are not admissible in evidence. *Scott* v. *McKinnish and wife*, 662
2. In an action of slander, common report of the truth of the fact, which the slanderous words assert, is not admissible in mitigation of damages. *Ib.* 662
3. In an action of slander, it is not necessary to prove the identical words charged, but proof of words substantially the same is sufficient. *Ib.* 662
4. Where a declaration, in an action of slander, charged the utterance of the words, "McK's wife is a whore," it is sufficiently supported by proof of the words, "she (McK's wife) is a whorish bitch." *Ib.* 662
5. As a general rule, the reputation of a female plaintiff, for chastity, may be assailed, in an action of slander, for words charging a want of it, to reduce the damages, but it is not permissible to direct such proof exclusively to her reputation in that respect, subsequent to the speaking of the slanderous words. *Ib.* 662
6. Under the plea of not guilty, in an action of slander, the defendant may prove, in mitigation of damages, any thing short of a justification, which does not necessarily imply, or tend to prove the truth of the words charged, but he cannot be permitted to prove facts and circumstances, which conduce to establish their truth, or which form a link in the evidence to make out a justification. *Ib.* 662
7. A repetition of the words, charged in a declaration in slander, to have been spoken by the defendant, or other actionable words uttered by him, in reference to the plaintiff, after the institution of the suit, are admissible in evidence, as tending to show *quo animo* the words charged were

SLANDER—CONTINUED.

spoken: but where such evidence is admitted, the jury should be instructed, that it is admitted for that purpose alone, and that they are not to give damages for other, than the words charged in the declaration.

8. It is not necessary in an action of slander, that the plaintiff should prove the speaking by the defendant of all the words charged, to entitle him to recover: Proof of a part of them, if actionable of themselves, is all that is required. *Ib.* 662

SLAVES.

1. Upon the indictment of a slave, for the murder of a white man, a finding by the jury, that the prisoner is "guilty of voluntary manslaughter," is sufficient to authorize the court, to sentence the slave to the punishment of death. *State* v. *Stephen*, 534

STATUTES.

1. Where a statute creates a liability to pay money, and prescribes no particular form of action for its recovery, an action of debt is the appropriate remedy. *Strange* v. *Powell*, 452
2. The 2d section of the act of 1846, requiring slave dealers to take out a license, is repealed by the 87th section of the act of 1848, to provide for the assessment, and collection of taxes; and as the last act contained no provision for the punishment of offenders under the former law, no fine can be imposed on those violating its provisions, after its repeal. *Jordan* v. *The State*, 746

STOCKS, AND HOLDERS OF.

1. Are not the stockholders in a corporation, which has by its regularly authorized agents created a lien on its effects in favor of a third person, estopped from asserting a lien created by said corporation in their favor? *quere.* *M. and C. P. R. R. Co.* v. *Talman and Ralstons*, 473

SUMMARY PROCEEDINGS.

1. A sheriff, or his sureties, proceeded against under the act of 1826, may insist on the fact of the receipt of the money being found by a jury; but if they appear, and make no objection, they will be considered as having waived it. *Evans* v. *Bank of the State et al.* 81
2. When the judgment entry recites, that proof was made, that the party proceeded against, was surety of the sheriff when the money was collected, and received by him, this court will intend, that it was proved by the production of the sheriff's bond, on which he was surety, and that that relation continued to exist, so as to embrace the period of default. *Ib.* 81
3. The plaintiff is not confined to the proof of the demand, at the time stated in the notice. Proof of demand at any time after the receipt of the money by the sheriff, and before the motion, will be sufficient. *Ib.* 81
4. Where a notice to a sheriff and his sureties, that a motion for judgment

SUMMARY PROCEEDINGS—CONTINUED.

will be made against them, is found in the transcript, it will not be regarded as a part of the record unless it is made so by a bill of exceptions, or is identified in the judgment entry. *Garey et als.* v. *Edwards & Allen*, 105

5. Where notice is given to a sheriff and his sureties that a motion for judgment will be made against them, the motion must be made at the term of the court, indicated in the notice, or some other proceeding be had to keep it alive, otherwise it will be considered as abandoned. *Ib.* 105

6. Where the judgment entry in a summary proceeding against a sheriff and his sureties, recites, that the defendants had notice of the motion, on a day *anterior* to the preceding term of the court, it will not be intended, to reverse the judgment, that the notice was of a motion designed to have been made at such preceding term, but which had not been made. *Ib.* 105

7. Where a suggestion against a sheriff and his sureties, for the failure of the sheriff to return an execution, after an accurate description of the jndgment and execution, states, that the plaintiff will "move and ask for a judgment against said defendant, for the amount of said debt, damages and cost, with legal damages for said default, and interest on said judgment to the trial thereof," it sufficiently indicated that the proceeding is instituted under the statute of 1819. *Ib.* 105

8. Where a suggestion against a sheriff and his sureties after describing the execution, avers the failure of such sheriff to "*execute*" and return it, and states, that the plaintiffs will move and ask for a judgment against the defendants for the amount of said debt, damages and cost "*with legal damages for said default*," the words, "*execute*," and, "*with legal damages for said default*," are surplusage, and will not vitiate the proceeding.—*Ib.* 106

9. Where a suggestion is made against a sheriff and his sureties, for a failure of the sheriff to return an execution, the record of the judgment on which such execution issued, though found in the transcript, will not be regarded as a part of it, unless made so by some action of the primary court. *Ib.* 106

10. When on the trial of a suggestion against a sheriff and his sureties for the failure of the sheriff to return an execution, the defendants neglect to appear and plead, the measure of damages being fixed by the statute, there is no necessity for the intervention of a jury. *Ib.* 106

11. Where on the trial of a suggestion against a sheriff and his sureties for the failure of the sheriff to return an execution, a jury is impaneled and sworn to assess the damages as well for a failure to "*execute*," as for a failure to return the execution, and judgment is rendered on the verdict, such judgment is erroneous, and cannot be sustained. *Ib.* 106

SUPERSEDEAS.

1. A writ of *supersedeas*, which embraces two separate executions, and commands the officer to suspend proceedings on each, is not a nullity. *Jones and Abernathy* v. *Welch*, 306

TIMBER TREES.

1. If G, intending to commit a trespass on the public lands, by cutting down and carrying away trees, through mistake cuts down trees on the land of K., he is liable to K., in an action of debt, for the penalty imposed by the statute of 1807. *Givens* v. *Kendrick*, 648
2. The cutting down of trees on the land of another, without his consent, and with knowledge on the part of the trespasser, that the land does not belong to him, is sufficient to subject him to the penalty imposed by the statute of 1807, although the trees may not be carried away. Clay's Digest, 581. *Ib.* 648

TRESPASS.

See Court, Charge of, 3, 4.
See Timber Trees, 1, 2.

TRUST.

1. A will containing the following clause: "I hereby will and bequeath unto my beloved wife, Catharine M. Ellis, my whole estate, real and personal, after the payment of my just debts, recommending to her, at the same time, to make some small allowance, at her convenience, to each of my brothers and sisters; say to each, one thousand dollars," does not create a trust in favor of the brothers and sisters of the testator. *Ellis et al.* v. *Ellis's adm'r*, 296
2. To convert the grantee of an absolute deed, into a trustee, the evidence should be clear, and satisfactory. *Corprew* v. *Arthur et als.* 525

TRUSTEE AND CESTUI QUE TRUST.

1. The interposition of a trustee in a deed for the use of a married woman, where the property goes into her possession, and the deed contains no words of exclusion, cannot prevent the marital rights of the husband from attaching upon the property. *Lenoir* v. *Rainey*, 667

UNIVERSITY OF ALABAMA.

1. Where, by a law of the University of Alabama, duly published, its tutors are required to hold their offices for the term of two years, unless permitted by the executive committee to resign, and by one of its ordinances, their salaries are fixed at $1,000 per annum, the election of a tutor, and his acceptance of the office, whilst such law and ordinance are in force, constitute a contract between him and the University, and the latter cannot, within the two years, reduce this salary, without his consent. *University* v. *Walden*, 655

VENDOR AND VENDEE.

1. Neither fraud, nor failure of consideration, is a good defence at law to a note given for the purchase money of land, when the vendee has accepted from the vendor a deed with covenant of warranty. *Patton* v. *England*, 69
2. A vendee of land, under a parol contract, who has given his note for the

VENDOR AND VENDEE—CONTINUED.

purchase money, and been let into possession, cannot avoid its payment, on the ground, that the contract is void by the statute of frauds. *Gillespie et al.* v. *Battle*, 276

3. A vendee of land, who takes and retains possession, under a parol contract of purchase, cannot defeat a recovery on his note, given for the purchase money, on the ground of want or failure of consideration, it not appearing, that the vendor has failed or refused to comply with his contract. *Ib.* 276

4. Although the admission of a vendor of land, that he has no title, may furnish a good ground for abandoning the possession and rescinding the contract, yet *the retention* of possession by the vendee, no fraud being shown, estops him from insisting, that the contract is a nullity, and that the note given by him for the purchase money is without consideration. *Ib.* 276

5. A proposition for a mutual rescission of a contract, assumes its validity, and the proposition being rejected, the parties stand where they did before. *Ib.* 276

6. Where a contract for the sale of land, on which a part of the purchase money has been paid, is afterwards rescinded, by mutual consent, in the absence of any agreement to the contrary, the law implies a promise on the part of the vendor to refund to the vendee, the money thus received by him. An express promise to refund is not necessary. *White* v. *Wood*, 358

7. Where the purchase money, for land, is paid by *one* person, and the deed is taken in the name of *another*, the former acquires but an equitable estate, a sale of which, under execution at law, vests no title in the purchaser. *Mitchell* v. *Robertson*, 412

8. Where a non-resident vendor of land is unable to make title, an averment, in a bill, filed by the vendee, that the vendor "is in very slender circumstances," and unable to respond in damages on her covenant of warranty, is sufficient to authorise the vendee to come into equity, to enjoin the collection of the purchase money. *Graham et als.* v. *Tankersley*, 634

9. A vendor of land, unless notified of the pendency of a suit, against the vendor for its recovery, and required to defend it, is not concluded by a judgment of eviction therein. *Ib.* 634

10. When a purchaser of land, asserts title by a conveyance, made after judgment was obtained against his vendor, before a justice of the peace, as against the judgment creditor, he must prove that he is not a volunteer, but that his conveyance is upon valuable consideration. *Dolin* v. *Gardner*, 758

See Evidence, 9, 10.

See Execution, 22.

WARRANTY.

1. If a bill of sale of blooded stock contains no warranty, express or implied, beyond that of title, parol evidence is inadmissible to add to it a simultaneous verbal warranty as to age and soundness. *Bush* v. *Bradford*, 317

WARRANTY—CONTINUED.

2. A slave was sold with warranty of soundness, and about two months afterwards, received a gun-shot wound in the arm, which tore the flesh, and shattered the bone. Mortification ensuing, the arm was amputated, and in a few days the slave died. The attending physicians, testified, that the slave labored under a chronic affection of the lungs, which had existed previous to the sale, and but for this disease, in the opinion of the physicians, the wound would not have proved mortal, nor would amputation have been necessary. Held, that the vendor was not liable upon his warranty, although the slave was diseased at the time of the sale, beyond the extent the disease depreciated his value, had he never received the wound of which he died; and was not liable for injuries received by the slave, after the sale, which acting on the system, conjointly with the disease, hastened his death. *Marshall* v. *Gantt*, 682
3. In an action upon a warranty of a slave, to recover damages for his unsoundness, it is improper to suffer the slave to be produced by the plaintiff, on the trial, and exhibited to the jury, without the consent of the defendant; and even then, it seems, the court may interpose, and refuse its assent.—*Ib.* 683

WILLS, TESTAMENTS, AND PROBATE OF.

1. A will, by which two slaves were given to J. M., a married woman, "during her life, then to her bodily heirs. If there should be no heirs, for said negroes and increase to go back to the heirs, and an equal division made amongst the heirs"—uncontrolled by any other clause in the will, showing that by the term *bodily heirs*, the testator meant *children*, vests the absolute estate in the first taker. *Machen* v. *Machen*, 373
2. A will ordered to probate, without citation to the next of kin resident within the State, or to their guardians, they being minors, is erroneous. *Lees* v. *Brownings*, 495
3. When a will has been ordered to probate, without citation to the next of kin, they may be made parties on petition, and sue out a writ of error.—*Ib.* 495

See Trust, 1.

WITNESS.

1. The transferror of a *chose in action*, is an incompetent witness to establish the claim. *Clifton et al.* v. *Sharpe*, 618
2. Where a party desires to impeach the credit of a witness, by proof of statements out of court in conflict with his testimony, he must first lay the predicate, by directing the attention of the witness to the time, place, and person, involved in the supposed contradiction. *Carlisle* v. *Hunley*, 623
3. Where an execution against G., is levied on slaves, which are claimed by S., upon a motion to quash the execution by G., S. having departed this life, a son of S., and joint legatee of his estate, is an incompetent witness for G. *Gilbert* v. *Bradford*, 770

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